Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 2002

RICARDO ORTIZ
Petitioner
v.

THE STATE OF TEXAS
Respondent

On Petition for Writ of Certiorari to The Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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78 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. A Texas statute provides that a challenge for cause may be made by the State for the reason that the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty. A death penalty defendant challenges the statute as facially invalid on the asserted basis that several jurors were excluded in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and its progeny. The State's highest court refuses to rule on the challenge after concluding that it narrowed the scope of the statute in a 1996 decision. In this situation, is a defendant foreclosed from challenging the statute as facially invalid under *Witherspoon* and its progeny?

2. Defense counsel fails to object as the State successfully challenges for cause 13 prospective jurors in a death penalty case solely because they have conscientious scruples with regard to the death penalty. This leaves only "death-qualified" jurors on the venire panel. The State's highest court rules that this was possibly a legitimate trial strategy by defense counsel. Does this ruling misapply the requirement of this Court that a defense counsel's trial strategy must be objectively reasonable?

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OPINIONS BELOW

The opinion of the highest state court entered in the case appears at Appendix A to this petition, and has been designated for publication, but is not yet reported.

BASIS FOR JURISDICTION

The highest state court decided this case on September 25, 2002. A copy of that decision appears at Appendix A. A timely motion for rehearing was thereafter denied on November 13, 2002. A copy of the order denying rehearing appears at Appendix B. The jurisdiction of this Court to review the judgment rendered in this case is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 35.16(b)1 of the Texas Code of Criminal Procedure provides:

> (b) A challenge for cause may be made by the State for any of the following reasons:
>
> (1) That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty.

U.S. Constitution, Amendment VI, provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed....

U.S. Constitution, Amendment XIV, Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law....

STATEMENT OF THE CASE

During the voir dire stage of Petitioner's death penalty trial, the trial court informed the venire panel that he was going to ask the prospective jurors "...some questions about [their] convictions regarding the death penalty." RR 3, 65. The trial court then asked the members of the venire panel to place a check mark by their "yes" or "no" answer to the following question:

> Do you have conscientious scruples in regard to the infliction of death for a person convicted of capital murder? Yes or no? If you have answered the preceding question yes, come up to the bench now. RR 3, 66

Those prospective jurors who checked "yes" in response to the conscientious scruples question were thereafter brought up to the bench individually, where the following exchange occurred (RR 3, pp. 66-81):

1. **Prospective Juror Reid (No. 38)**:

Def. Counsel: Mr. Reid.

Trial Court: Yes, sir.

Juror: In regards to the question you just asked- —

Trial Court: Yes.

Juror:— about the death penalty, I checked on the yes.

Trial Court: You have conscientious scruples regarding –

Juror: Yes.

Trial Court: Anybody want to ask him any questions? Take your seat, sir? State challenge?

Prosecutor: Yes.

Trial Court: All right. Court grants the challenge. Next person.

2. **Prospective Juror Bonilla (No. 57):**

Juror: 57, Elizabeth Bonilla. I think only God has a right to take someone's life.

Trial Court: You have conscientious scruples against the infliction of the death penalty in all cases? Anybody want to ask questions?

Def. Counsel: No questions.

Prosecutor: No questions.

Trial Court: Take your seat, ma'am.

Prosecutor: Challenge.

Trial Court: Court grants the State's challenge.

Def. Counsel: Ms. Bonilla's number was what?

Prosecutor: 57.

Trial Court: Next person.

3. **Prospective Juror Berlit (No. 83):**

Juror: Chris Berlit, B-E-R-L-I-T, number 83. I do have reservations to the death penalty.

Trial Court: What do you mean by "reservations"?

Juror: I've been born, raised and educated in

Europe, and I believe that an appropriate punishment would be life in prison.

Trial Court: The question is not really that. Do you believe the death penalty unjustified in all cases?

Juror: Yes. Yes, sir.

Trial Court: Questions?

Prosecutor: State challenges.

Trial Court: State's challenge is granted.

4. **Prospective Juror Reta (No. 127):**

Juror: Number 127, Diana Reta.

Prosecutor: 127, Judge.

Juror: And I answered yes to conscientious scruples in regard to the death penalty.

Trial Court: Is this a religious conviction or—

Juror: It's just a moral, personal —

Trial Court: You're opposed to the death penalty in all cases?

Juror: Yes, sir.

Trial Court: Questions, State?

Prosecutor: No, Your Honor.

Trial Court: No, Your Honor.

Def. Counsel: No questions, Your Honor.

Trial Court: Next person.

Prosecutor: State is going to challenge that juror –

Trial Court: Granted.

5. **Prospective Juror Lopez (No. 132):**

Juror: 132. Yvonne Lopez.

Trial Court: Ms. Lopez, what is your statement to the Court?

Juror: I would have a problem with the death penalty.

Trial Court: Anybody would have a problem with it.

Juror: Personally, I would have a problem. Yes, I'm a Catholic, and only God gives life, and only God takes life away.

Trial Court: I'm just trying to tell you, it's a problem for anybody. But do you have conscientious scruples against the death penalty in —

Juror: Yes.

Trial Court: — any and all cases?

Juror: Most probably in all cases.

Trial Court: In all cases?

Juror: I've never been faced with it, but I think I would have a problem.

Trial Court: It's not a question of having a problem. I'm not trying to —

Juror: I answered.

Trial Court: I'm not trying to contradict you. Anybody that has any sensibility would have a problem with the issue. The question is, are you opposed to the death penalty in all cases, regardless of what the facts might show?

Juror: Yes.

Trial Court: Questions?

Prosecutor: No questions.

Prosecutor: No.

Def. Counsel: No questions.

Trial Court: Take your seat.

Def. Counsel: State challenges. Judge, State

challenged that last juror.

Trial Court: All right. Granted. I've forgotten the name.

6. **Prospective Juror Herrick (No. 123):**

Juror: Jeffrey Herrick, 123.

Trial Court: Mr. Herrick, you have -- I'm not going to put words in your mouth.

Juror: I'm opposed to the death penalty based on my convictions as a Quaker.

Trial Court: Is that in any and all cases?

Juror: Yes.

Trial Court: Questions?

Prosecutor: I think he'd been previously excused.

Prosecutor: No, he was not.

Juror: No, I just asked for permission to come in late.

Trial Court: Have your seat, sir.

Prosecutor: Move to challenge him, Your Honor.

Trial Court: Granted .

7. **Prospective Juror Escamilla (No. 56):**

Juror: Number 56, Robert Escamilla.

Trial Court: Yes, sir.

Juror: I don't believe in the death penalty.

Trial Court: You don't believe it's justified in any case?

Juror: No, sir.

Prosecutor: No questions.

Def. Counsel: No questions.

Prosecutor: He answered affirmatively?

Trial Court: He said he didn't believe it was justified in any case.

Prosecutor: We have no questions.

Prosecutor: State challenges.

Trial Court: Granted.

8. **Prospective Juror Cortinas (No. 74):**

Juror: Dolores Cortinas, juror 97. Sir, I do not believe in the death penalty.

Trial Court: You do not believe in the death penalty for any case whatsoever?

Juror: No, sir.

Prosecutor: No questions, Your Honor.

Trial Court: You may take a seat.

Prosecutor: State challenges.

Trial Court: All right. Granted.

9. **Prospective Juror Estala (No. 11).**

Juror: Andre Estala, number 11. And I do have a conscientious scruple about this.

Trial Court: What is your statement about the death penalty?

Juror: I don't believe in it, sir, in any degree.

Trial Court: In any kind of case whatsoever?

Prosecutor: That's correct.

Trial Court: You believe it's never justified?

Juror: Never justified?

Prosecutor: No questions, Your Honor.

Def. Counsel: No questions.

Trial Court: You may return to your seat.

Prosecutor: State moves to challenge.

Trial Court: Granted.

10. **Prospective Juror Portillo (No. 154).**

Juror: Jorge Portillo, 154.

Trial Court: You are Jorge Portillo. What is your statement on the death penalty?

Juror: I don't believe it's right.

Trial Court: Never justified under any circumstances?.

Juror: Two wrongs do not make a right, sir.

Prosecutor: No questions.

Trial Court: You may take a seat.

Prosecutor: State challenges.

Trial Court: All right.

Prosecutor: Is that granted — I'm sorry on the last juror.

Trial Court: Granted.

11. **Prospective Juror Gallegos (No. 112):**

Juror: Rose Gallegos, number 112.

Trial Court: Make your statement as to the death penalty, Mrs. Gallegos.

Juror: As a practicing Catholic, I do not believe in the death penalty.

Trial Court: You don't believe it is justified in any case whatsoever?

Juror: No, sir.

Prosecutor: No questions.

Def. Counsel: No questions.

Trial Court: Take your seat, please, ma'am.

Prosecutor: State will challenge.

Trial Court: You do challenge?

Prosecutor: Yes.

Trial Court: Granted. Come up please, ma'am.

12. **Prospective Juror Palomo (No. 142):**

Juror: Number 142.

Trial Court: You are Ms. Palomo.

Juror: Yes. I oppose the death penalty. I believe that the Lord gives us life, and he's the only one that's supposed to --

Trial Court: You're opposed to the death

penalty, no matter what the circumstances?

Juror: Yes. Yes.

Prosecutor: No questions.

Def. Counsel: No questions, Your Honor.

Trial Court: Take your seat, please, ma'am.

Prosecutor: State challenges this juror.

Trial Court: Granted.

13. **Prospective Juror Caballero (No. 108):**

Juror: Adriana Caballero, 108

Trial Court: Make your statement as to what — make your statement. What is your belief about the death penalty?

Juror: I am strongly opposed to the death penalty.

Trial Court: You think that the death penalty should never be inflicted in any case whatsoever, regardless of the facts?

Juror: Yes.

Prosecutor: No questions.

Def. Counsel: No questions.

Trial Court: You may take your seat.

Prosecutor: State would challenge, Your Honor.

Trial Court: Granted.

On direct appeal to the Texas Court of Criminal Appeals, Petitioner asserted that the trial court had deprived him of a fair and impartial jury, as guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution, by striking several prospective jurors from the venire panel pursuant to Article 35.16(b)1 of the Texas Code of Criminal Procedure, which Petitioner challenged as unconstitutional on its face. Citing *Witherspoon v. Illinois et al.*, 391 U.S. 510, 88 S.Ct. 1770 (1968) and its progeny, Petitioner contended that Article 35.16(b)1 deprived him of a fair trial because it enabled the State to challenge for cause the above-listed jurors solely because they had conscientious scruples in regard to the infliction of death for a capital offense. Petitioner based his analysis on the wording of Article 35.16(b)1, which states:

> (b) A challenge for cause may be made by the State for any of the following reasons:
>
> (1) That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty.

Petitioner contended that Article 35.16(b)1 was facially unconstitutional because its wording was essentially identical to the Illinois statute declared unconstitutional in *Witherspoon*, *supra*, which provided: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *Witherspoon*, 391 U.S. at 512; 88 S.Ct. at 1772.

The Texas Court of Criminal Appeals rejected Petitioner's second ground of error, stating:

> Ortiz initially claims that Article 35.16 is unconstitutional on its face, in violation of *Wainright v. Witt*, and any challenges granted pursuant to that statute must be deemed invalid. However, we have already held that Article 35.16 "is a ground for disqualification only to the extent constitutionally permitted by *Witt*." Having already narrowed the scope of the statute to what is constitutionally permissible, we perceive no further basis for complaint. See Opinion, *App. A*, pp.16-17(footnote numbering omitted).

To support its holding, the Court of Criminal Appeals cited its earlier decision in *Ramos v. State*, 934 S.W.2d 358 (Tex.Crim.App. 1996). *Id.*, at f.n. 15. In *Ramos*, the appellant attacked *Wainright v. Witt, supra*, as unconstitutional and complained of the trial court's exclusion for cause of five

prospective jurors opposed to the death penalty. In the course of overruling the appellant's constitutional challenge to *Witt*, the Court of Criminal Appeals noted: "The Texas statute [Article 35.16(b)1] is a ground for disqualification only to the extent constitutionally permitted by *Witt*." *Id.*, at 366.

Petitioner did not challenge the constitutionality of Article 35.16(b)1 until the filing of his first appeal to the Court of Criminal Appeals. In his brief, Petitioner cited the following decisions of the Texas Court of Criminal Appeals as authorizing him to raise for the first time on appeal a facial challenge to the constitutionality of Article 35.16(b)1: *Rose v. State*, 752 S.W.2d 529 (Tex.Crim.App.1988), *Long v. State*, 742 S.W.2d 302 (Tex.Crim.App.1987) and *Rabb v. State*, 730 S.W.2d 751 (Tex.Crim.App.1987). The Court of Criminal Appeals did not dispute Petitioner's authority on this point or suggest that error had been waived. Instead, it held (as noted above) that because it had previously narrowed the scope of Article 35.16(b)1, nothing was presented for review.

The Court of Criminal Appeals further rejected Petitioner's assertion that his trial counsel had rendered ineffective assistance by failing to object to the exclusion of those prospective jurors who had check marked "yes" to the question

question of whether they had conscientious scruples in regard to the infliction of the death penalty in a capital case. The court reasoned that where trial "counsel's reasons for his conduct do not appear in the record, and there is at least the possibility that the conduct could have been legitimate trial strategy, it would defer to trial counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." See Opinion, *App. A*, pp. 17-18. After concluding that trial counsel's reasons for not objecting to these prospective jurors (13 of them) did "not appear in the record," it then determined that Petitioner's trial counsel's failure to object to the exclusion of these prospective jurors could have been based on legitimate reasons. See Opinion, *App. A*, at pp. 17-18.

REASONS FOR GRANTING PETITION

The Texas Court of Criminal Appeals' refusal to consider Petitioner's challenge to the constitutionality of Article 35.16(b)1 of the Code of Criminal Appeals irreconcilably conflicts with numerous decisions of this Court. Understanding the nature of the conflict first requires identifying the effect of the Court of Criminal Appeals' holding. The Court of Criminal Appeals did not dispute Petitioner's claim that Article 35.16(b)1 was unconstitutionally applied in his case or that several

prospective jurors were excused from the venire panel solely because they admitted to having conscientious scruples in regard to the infliction of death for a person convicted of a capital offense. Nevertheless, it held that Petitioner had presented nothing for review because it had narrowed the scope of the statute by declaring in a previous decision that Article 35.16(b)1 was "a ground for disqualification only to the extent constitutionally permitted by *Witt.*"

The Court of Criminal Appeals accordingly made no attempt to determine whether Article 35.16(b)1 had been properly applied in Petitioner's case. If it had, it would have concluded that the trial court had misapplied the statute by allowing the State to challenge for cause several prospective jurors solely because they had conscientious scruples in regard to the infliction of death for a person convicted of a capital offense. The trial court's decision to apply Article 35.16(b)1 to the letter was therefore deemed irrelevant.

Granting review of this petition is necessary since Article 35.16(b)1 has been applied in a manner which wholly disregards this Court's decision in *Witherspoon v. Illinois et al*, 391 U.S. 510, 88 S.Ct. 1770 (1968), a case directly on point.

In *Witherspoon*, this Court declared unconstitutional a statute essentially identical to Article 35.16(b)1 because it excluded "veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, 391 U.S. at 521-522; 88 S.Ct. at 1776-1777. The Court of Criminal Appeals' analysis also disregards this Court's decision in *Wainright v. Witt*, 469 U.S. 412; 105 S. Ct. 844 (1985), which held that a prospective juror could only be excluded where that prospective juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.*, 469 U.S. at 424; 105 S.Ct. at 852.

The conflict created between the Court of Criminal Appeals' decision and this Court's decisions arises from the purported narrowing construction the Court of Criminal Appeals says it has applied to Article 35.16(b)1. The problem with such an analysis is evident: Despite what it says, the Court of Criminal Appeals did not apply a narrowing construction to Article 35.16(b)1 in Petitioner's case. When faced with un-refuted evidence that the trial court had excluded several prospective jurors under Article 35.16(b)1 solely because they

had conscientious scruples with regard to application of the death penalty, the Court of Criminal Appeals did nothing to correct the error. Prospective jurors like Reid and Bonilla (the first two jurors called up) were summarily challenged and excluded from the venire panel merely because they gave an affirmative response to the conscientious scruples question submitted to them by the trial court. Other prospective jurors (such as Berlit, Herrick, and Escamilla) were excluded solely because they were in general opposed to the death penalty, not because their views prevented or substantially impaired them from performing their duties as jurors in accordance with the jurors' instructions and oath (as required by *Wainright v. Witt, supra.*) Accordingly, no attempt was made in Petitioner's case by either the trial court or the Court of Criminal Appeals to apply a narrowing construction to Article 35.16(b)1, although the Court of Criminal Appeals claims otherwise.

The situation resembles that which occurred in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980) and *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988). In both cases, this Court rejected claims by Georgia and Oklahoma courts that they had applied a narrowing construction to the aggravating circumstance portion of the death penalty statutes

under scrutiny in these cases once it realized that no such narrowing construction had in fact been applied to these statutes.

The consequence of allowing the Court of Criminal Appeals' holding to go undisturbed is easy to see. At the state court level, Article 35.16(b)1 will be forever insulated from federal constitutional challenge because of the purported narrowing construction the Court of Criminal Appeals claims to have given the statute in its 1996 decision. Henceforth, any federal constitutional challenge to Article 35.16(b) will be rejected, irrespective of whether *Witherspoon* error has occurred, simply because the Court of Criminal Appeals says it has given the statute a narrowing construction. Not only does such a holding undermine *Witherspoon* and *Witt*, *supra*, but it purports to place Article 35.16(b)1, a statute admittedly unconstitutional on its face, completely beyond the reach of the federal courts.

A second problem with the Court of Criminal Appeals' narrowing construction analysis is that Article 35.16(b)1 is not susceptible to a narrowing construction. In *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502 (1987) and several other

decisions, this Court has recognized that federal courts should not adopt a narrowing construction to a state statute unless the statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Id.*, 482 U.S. 468; 107 S.Ct. at 2513. See also *Stenberg v. Carhart*, 530 U.S. 914, at 944, 120 S.Ct. 2597, at 2616 (2000)(refusing to adopt narrowing construction to a state statute "unless such a construction is reasonable and readily apparent"); and *Boos v. Barry*, 485 U.S. 312, at 330, 108 S.Ct. 1157, at 1168-1169 (1988)(applying same rule).

Stated another way, where "the naked question, uncomplicated by [ambiguous language], is whether [a state statute] on its face is unconstitutional," federal courts should not hesitate to exercise properly invoked jurisdiction. See *Houston v. Hill*, 482 U.S. at 468-470; 107 S.Ct. at 2513-2514. Therefore, just as there was no ambiguity in the ordinance declared unconstitutional in *Hill*, there is no ambiguity or uncertainty regarding the meaning of Article 35.16(b)1 of the Texas Code of Criminal Procedure. The statute unequivocally states that any prospective juror who has conscientious scruples in regard to the infliction of the punishment of death in a capital case is subject to challenge for cause. No narrowing

construction can fairly be applied since Article 35.16(b)1 allows for no exception to the exclusion of prospective jurors who have conscientious scruples in regard to the infliction of death as a penalty in a capital case. By its plain meaning and express language, the statute irreconcilably conflicts with *Witherspoon* and *Witt* and should be declared unconstitutional on its face. In this regard, it bears noting that the State of Texas has failed to assert an adequate and independent state ground so as to preclude federal review of Petitioner's claim that Article 35.16(b)1 is unconstitutional. See *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983). Instead, the Court of Criminal Appeals' decision rests solely upon federal law.

Granting review of this petition is also necessary for another reason. The Court of Criminal Appeals' holding that it may have been a legitimate trial strategy for Petitioner's trial counsel to fail to object when the trial court struck (at the State's request) 13 prospective jurors solely because of the way these jurors answered the conscientious scruples question conflicts with important decisions of this Court. The flaw in the Court of Criminal Appeals' analysis can only be understood within the context of the voir dire record. Every prospective juror in Petitioner's case who checked "yes" to the question of

whether he or she had conscientious scruples in regard to the infliction of death for a person convicted of a capital offense was challenged by the State and struck for cause pursuant to Article 35.16(b)1. The pattern was the same with each juror. Neither counsel for the State nor Petitioner's trial counsel attempted to pick or choose among those jurors who answered the conscientious scruples question affirmatively.

One-by-one, every prospective juror who stated that he or she had conscientious scruples was called up to the bench and struck for cause (at the request of the State) without Petitioner's trial counsel lodging the necessary *Witherspoon* objection. The reason Petitioner's trial counsel failed to object is apparent: They clearly were unfamiliar with the decisions of this Court in *Witherspoon* and *Witt*, and therefore did not realize that Article 35.16(b)1 was unconstitutional on its face. The reason the State's prosecutors objected to those prospective jurors who had conscientious scruples in regard to the infliction of death for a capital offense was also apparent. They realized that by excluding every prospective juror on the venire panel who had conscientious scruples in regard to the infliction of the death penalty, the State would be assured of a death penalty if Petitioner were convicted.

The Court of Criminal Appeals' determination that it might have been a legitimate trial strategy for Petitioner's trial counsel to sit idly by while each of these prospective jurors were called up, challenged by the State, and then struck for cause is disingenuous at best. More fundamentally, this holding disregards the Court's ruling in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), which defined the test used today for ascertaining whether effective assistance of counsel has been rendered. In *Strickland*, this Court concluded that in order to establish that a defendant's attorney has rendered ineffective assistance of counsel, a showing must be made that counsel's representation "fell below an objective standard of reasonableness." *Id.*, 446 at 687-688; 104 S.Ct. at 2064. See also *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029 (2000)(where this Court applied the same "objective standard of reasonableness" test in determining whether effective assistance of counsel had been rendered).

These and other decisions establish that the Texas Court of Criminal Appeals erred in applying a subjective standard to Petitioner's ineffective assistance claim. By any objective measure, the decision of Petitioner's trial counsel to allow these prospective jurors to be excluded for cause solely because they

had conscientious scruples in regard to the infliction of the death penalty must be viewed as deficient. No competent counsel would have permitted the State to remove every prospective juror with conscientious scruples, so that the only jurors left on the venire panel would be those who possessed the unwavering view that imposition of a death sentence was necessary in the event Petitioner's guilt were proven.

The Court of Criminal Appeals' refusal to view Petitioner's ineffective assistance claim objectively, combined with its refusal to entertain Petitioner's Sixth and Fourteenth Amendment challenges to Article 35.16(b)1, has dealt a "death blow" to *Witherspoon* in Texas. It is now arguably impossible for any death penalty defendant in Texas to object to a trial court's decision to exclude a prospective juror from a venire panel solely because that juror has conscientious scruples in regard to the infliction of death for a capital offense. *Witherspoon* error is now considered a legitimate trial strategy by the Texas Court of Criminal Appeals, and the misapplication of Article 35.16(b)1 is said to present nothing for Texas courts to review, even if application of the statute results in obvious and plain *Witherspoon* error.

CONCLUSION

For the reasons outlined above, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO.73,692

RICARDO ORTIZ, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM EL PASO COUNTY

Keasler, J., ***delivered the unanimous opinion of the Court.*** **Keller, P.J.,** ***and*** **Womack, J.,** ***filed concurring opinions.***

OPINION

Ricardo Ortiz was convicted of capital murder by committing murder in the course of retaliation or attempted retaliation.[1] Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure, Articles 37.071 §§2(b) and 2(e),[2] the trial judge sentenced appellant to death.[3]

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[1] TEX. PEN. CODE §19.03(a)(2).

[2] Unless otherwise indicated all future references to Articles (continued...)

Direct appeal to this Court is automatic.[4] Ortiz raises thirteen points of error, contending that the trial judge erred in various respects. We find his arguments meritless and affirm the trial court's judgment.

I. SUFFICIENCY OF THE EVIDENCE

A. The evidence

1. *The autopsy*

On August 17, 1997, Gerardo Garcia died in the El Paso County Jail of a heroin overdose. Dr. Juan Contin, the Chief Medical Examiner of El Paso County, conducted the autopsy. Contin found that Garcia died of "acute narcotism," caused by morphine (a byproduct of heroin) found in his body. The concentration of morphine in Garcia's blood was 523 ng/ml – a level that was three times higher than the average when compared to 76 deaths due to acute narcotism that had been investigated by Contin's office from January 1995 to September 1997. Contin found a single fresh needle mark on one of

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(...continued)
refer to the Code of Criminal Procedure.

[3] Art. 37.071, §2(g).

[4] Art. 37.071, §2(h).

Garcia's arms but observed no needle track marks. In Contin's opinion, the absence of track marks meant that Garcia was not a heroin addict. A sheriff's detective found a syringe in the section of the jail in which Garcia was confined.

2. *Mario Hernandez*

At trial, two witnesses testified that the heroin overdose was involuntary – forced upon Garcia by Ortiz because Ortiz believed that Garcia had revealed Ortiz's role in some bank robberies. Mario Hernandez was in the same section of the jail as Garcia when he died. He testified that this particular section was known as the "Texas Syndicate tank" because it was set aside specifically to contain those associated with the Texas Syndicate. Mario was not a member of the Texas Syndicate but was placed in the tank because his cousin was a member. Mario had not known Garcia or Ortiz before meeting them in the Texas Syndicate tank. According to Mario, Ortiz was the "tank boss," meaning he exercised *de facto* authority over the other inmates in the tank because of his status with the Texas Syndicate. Ortiz controlled what inmates requested from the jail commissary and he dealt with jailers on behalf of the other inmates.

When Garcia was brought into the tank, Mario saw Ortiz "freak." Mario overheard a conversation between Ortiz and Garcia in which Ortiz expressed great concern that Garcia had been caught for some bank robberies. Ortiz and Garcia argued about whether Garcia's capture was the result of being "snitched off" by Garcia's girlfriend or Ortiz's wife. Mario also overheard more than ten phone calls made by Ortiz in which Ortiz attempted to sell a trailer to get money to purchase heroin. Ortiz remarked that he wanted to bring heroin into the jail. Ortiz later succeeded in procuring heroin during visiting hours. Mario knew when Ortiz had obtained the heroin because Ortiz and another inmate were high on heroin when they returned from the visitor's booth. As a heroin addict, Mario could recognize when other people were high on the drug.

On August 17, Ortiz and several other inmates called Garcia into one of the individual cells within the tank – cell number five. Mario explained that he was seated at a table in the tank's day-room about five feet away from the doorway of that cell and could see inside. He then described seeing the following sequence of events: Garcia was sitting on a bunk bed in cell number five. Ortiz handed another inmate some heroin. This other inmate dissolved the heroin into water and placed it

into a syringe. The syringe containing heroin was handed to Ortiz. Ortiz then injected the heroin into Garcia, who did not look like he wanted to be injected. Almost immediately, Garcia began shaking from what appeared to Mario to be "overdosing."

Ortiz noticed that Mario and another inmate not involved in the encounter had witnessed the events. Ortiz brought them heroin, and they injected themselves with it. He told them that Garcia had overdosed, that Garcia was stingy with the heroin and did it all, and that they were not to say anything about the incident.

On cross-examination, Mario admitted that he did not actually see the heroin exchange hands before it was "cooked." Defense counsel showed Mario a sketch of the floor plan of the tank. This sketch was prepared by a detective several days after the murder. Defense counsel asserted that the sketch showed that Mario was not really seated at the day-room table closest to cell number five but was actually seated at a table further away. However, Mario explained that he did not draw the sketch himself, and that, while he signed it, the sketch was inaccurate in some respects, including placing Ortiz and Garcia in the wrong locations.

On redirect, Mario explained that he could not really see the sketch while the detectives were drawing it, and he reiterated that he had an unobstructed view into cell number five from his seat at the day-room table. Finally, Mario testified that a photograph admitted as State's Exhibit 14 fairly and accurately depicted the view he had into cell number five; that photograph shows an unobstructed view into the cell.

3. *Hector Hernandez*

Hector Hernandez testified that he was not a member of the Syndicate but was a prospect Ortiz was trying to bring into the organization. Hector testified that he was in the Syndicate tank at the time of the incident in question and that Ortiz ran the tank. Hector heard Ortiz say that Garcia had snitched him out and was going to have to die. Initially, Ortiz planned to stab Garcia but later decided to overdose the victim instead, to make it look like a suicide. Ortiz told Hector that some heroin had been obtained through a visit, and Ortiz planned to use three "dimes" of heroin to kill Garcia. Three days before Garcia died, Ortiz said he was going to kill Garcia. Although Hector was not a heroin user, he used heroin the night of the murder because Ortiz told him to. In addition, Ortiz told Hector to lie about the incident by saying the heroin belonged to Garcia.

Hector also testified that he was afraid of Ortiz, that he knew both Garcia and Ortiz, and that Garcia was not a heroin user.

On cross-examination, Hector testified that Garcia indicated several times that he wanted to commit suicide because of the crimes he committed. Hector also testified that he had a deal with the State to testify but was told to say there was no deal. On redirect, Hector testified that no one told him that he had to testify in exchange for not being arrested. He further testified that he would be killed if he were incarcerated and that he testified earlier to having a deal because he was frightened of Ortiz. Hector also testified that his pending charge was due to an attempt to bring drugs into jail on Ortiz's orders.

4. *Law enforcement witnesses*

Louie Carreon, a detective with the El Paso Police Department, testified that Ortiz offered to give information on a bank robbery in exchange for help regarding a parole revocation warrant.

Thomas Lott, a special agent for the FBI, testified that an ex-girlfriend of Garcia told the police that she believed that Garcia was involved in some bank robberies, that Garcia and Ortiz had counted money in her living room, and that Garcia

had sold a vehicle to Ortiz. Law enforcement agents picked up Garcia, and he was identified by bank tellers in a photo lineup. While Garcia was being detained at the police station, Ortiz was brought near the area in which Garcia was located so that he could observe Garcia with law enforcement agents and be led to believe that Garcia was talking to the police. Special Agent Lott showed Ortiz a document indicating that Ortiz was a witness against Garcia and indicated that Garcia would know this. In reality, however, Garcia never cooperated with the authorities.

James Nance, a sergeant with the El Paso County Sheriff's Department, testified as an expert on prison gangs. Nance testified that Ortiz was the highest ranking member of the Texas Syndicate in El Paso that he was aware of. Given his high rank, Ortiz would automatically become a tank boss of any Texas Syndicate section, and he could even be able to order the death of someone in the tank.

5. *Defense witnesses*

The defense presented some testimony about Garcia's desire to commit suicide. Yvonne Chavira, a former girlfriend

of Garcia,[5] testified that Garcia said he would kill himself if he were placed in jail again. During cross-examination, Chavira admitted that she had previously told lies to the authorities about Garcia. Doctor John Buscemi read a notation in a jail medical record that indicated Garcia felt suicidal at age 15. Alino Hernandez, a detention division commander for the El Paso Sheriff's Department, testified that a 1990 screening form contained a "yes" answer to the question of whether Garcia had ever attempted or seriously considered committing suicide. However, a 1993 form said "no," a January 1994 form had "no" checked but "yes" circled, an August 1994 form had "no" circled accompanied with a question mark, and the latest form, in 1997, simply had "no" checked.

Finally, the defense attempted to impeach Hector's testimony through the testimony of his attorney, Donna Snyder. Snyder testified that Hector told her he had a deal with the State to "have a clean record and have a chance at a new life." But he expressed concern because it was his understanding that, if asked about it on the stand, he should testify that there was no

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[5] Some testimony by other trial witnesses indicates that she is the same ex-girlfriend that reported Garcia to the police, but no testimony was elicited from her concerning her report.

deal. On cross-examination, the prosecutor showed Snyder a document filed in the clerk's office. This document stated that Hector would not be arrested and jailed for the drug possession case so long as he was a potential witness against Ortiz. The document also said that Hector was being housed as an out-of-state witness during the pendency of the trial, after which he would be returned to his originating state where his probation would resume. Snyder testified that the document did not seem consistent with what Hector had told her.

B. Legal sufficiency – retaliation – "prospective witness"

In his fourth point of error, Ortiz claims the evidence is legally insufficient because the State failed to prove that Garcia was a prospective witness. He argues that the State did not establish that Garcia was likely to be a witness for the State. We disagree because the statute does not require that a person's testimony be "likely" in order for that person to be a prospective witness. On the contrary, we have held that a "prospective witness" is any "person who may testify in an official proceeding."[6] Formal proceedings need not be

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[6] *Morrow v. State*, 862 S.W.2d 612, 614 (Tex. Crim. App. 1993).

initiated."[7] Any person who is involved in an offense with a defendant, who sees the defendant committing an offense, or who hears the defendant discuss committing an offense is a "prospective witness" in the prosecution of that defendant because he "may" testify.

Ortiz complains that this interpretation changes the statute from "prospective witness" to "potential witness." He explains that the word "prospective" means "likely to become" whereas "potential" means "something that can develop." But "prospective" is also defined as pertaining to a prospect, and "prospect" as a "possibility."[8] While "prospective" can mean something different than "potential," it can also be synonymous with "potential." The Legislature's decision to use the word "prospective" does not prevent the statute from applying to situations in which "prospective" becomes synonymous with "potential."

Ortiz also argues that Garcia was not a prospective witness because he had a Fifth Amendment right to remain silent

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[7] *Id.*

[8] WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY 1821 (1966).

and there is no evidence that the State offered him immunity for his testimony. But whether a person will eventually testify does not affect whether he is, before trial, a prospective witness. It is impossible to know, until the moment of trial, who will actually testify in a case. A prosecutor may engage in extensive meetings with a witness with the intention of calling him at trial, only to change his mind at the last minute. On the other hand, a prosecutor may believe initially that a witness has nothing to offer his case, but decide at the last minute to use his testimony. And, many times, the prosecutor himself will not know whether any given person will be available at the time of trial or be willing to testify. The phrase "prospective witness" encompasses all of these possibilities.

Finally, Ortiz argues that our conclusion nullifies subsection (a)(2) of § 36.06 because anybody found guilty under (a)(1) would necessarily be guilty under (a)(2). Subsection (a)(1) of § 36.06 prohibits harming or threatening to harm another in retaliation for his service as a public servant, witness, prospective witness, or informant. Subsection (a)(2) prohibits harming or threatening to harm another to prevent or delay his service as a public servant, witness, prospective witness, or informant. Ortiz claims that under our

interpretation, "[t]here would be no point to even enact" (a)(2) because anyone who could be prosecuted under (a)(2) could also be prosecuted under (a)(1).

We disagree because the statutory overlap which Ortiz recognizes exists regardless of whether "prospective" is defined as "likely" or "may." Moreover, it exists only with regard to the phrase "prospective witness" and not public servant, witness, or informant – the other options in the statute. In interpreting statutes, we seek to avoid redundancies,[9] but we also endeavor to give effect to the whole statute, including each word and phrase.[10] And the mere fact that a defendant can be prosecuted under two different subsections of a statute does not necessarily "nullify" either section of the statute, as Ortiz claims.

We conclude that the evidence was sufficient for a rational trier of fact to conclude that Garcia was a "prospective witness" and that Ortiz harmed him "in retaliation for or on account of" this fact. He was a prospective witness because he

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[9] *Badgett v. State*, 42 S.W.3d 136, 139 (Tex. Crim. App. 2001).

[10] *Nguyen v. State*, 1 S.W.3d 694, 696 (Tex. Crim. App. 1999).

had been involved in a robbery with Ortiz and had already been identified by one of the robbery victims. Certainly, Garcia possessed information which could have been relevant at Ortiz's trial such that Garcia may have testified at that trial. In addition, a rational trier of fact could conclude from this evidence that Ortiz acted in "retaliation" because Ortiz knew that Garcia had been involved in the robbery with him. A rational jury could conclude that Ortiz harmed Garcia because he might testify against him. We overrule Ortiz's fourth point of error.

C. Factual sufficiency – murder

In point of error eleven, Ortiz contends that the evidence is factually insufficient to prove that he murdered Garcia. In conducting a factual sufficiency review, we view the evidence in a neutral light and set aside the verdict only if the evidence supporting guilt is so obviously weak, or the contrary evidence so overwhelmingly outweighs the supporting evidence, as to render the conviction clearly wrong and manifestly unjust.[11] While a reviewing court has some authority to disregard

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[11] *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

evidence that supports the verdict, it must be appropriately deferential so as to avoid substituting its own judgment for that of the fact finder.[12] The reviewing court should not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony.[13]

Ortiz contends that the evidence is factually insufficient because Mario's testimony that he saw Ortiz inject Garcia with heroin is not credible and should be disregarded. In support of this contention, Ortiz argues that a sketch of the jail shows that Mario could not have had an unobstructed view of the crime. He also points out that Mario admitted to not seeing everything that occurred in cell number five during the incident in question. Finally, Ortiz contends that Mario's credibility is undermined by his extensive criminal history and admitted heroin addiction.

As discussed above, Mario testified that the jail sketch was inaccurate in some respects. And while he admitted that he did not see the heroin exchange hands before it was cooked, he maintained that he saw the heroin being cooked, saw the syringe

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[12] *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 944 (2001).

[13] *Id.*

being passed to Ortiz, and saw Ortiz inject Garcia with the contents. Although Mario had a criminal history and was a heroin addict, his credibility was a matter for the jury to decide. After reviewing the evidence in a neutral light, we find that the evidence in support of the conviction is not so weak as to render the conviction clearly wrong and manifestly unjust. Point of error eleven is overruled.

II. VOIR DIRE

In points of error two, three, nine, ten, and thirteen, Ortiz complains about the trial court's granting of State's challenges for cause against prospective jurors who had conscientious scruples about the death penalty. Ortiz initially claims that Article 35.16 is unconstitutional on its face, in violation of *Wainwright v. Witt*,[14] and any challenges granted pursuant to that statute must be deemed invalid. However, we have already held that Article 35.16 "is a ground for disqualification only to the extent constitutionally permitted by *Witt*."[15] Having already narrowed the scope of the statute to

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[14] 469 U.S. 412 (1985).

[15] *Ramos v. State*, 934 S.W.2d 358, 366 (Tex. Crim. App. (continued...)

what is constitutionally permissible, we perceive no further basis for complaint.

Ortiz next contends that a number of jurors were excused in violation of *Witt*. With one exception – the subject of point of error three – Ortiz did not object to the trial court's actions in granting the State's challenges. A party must object to the granting of a challenge for cause before he can complain of that action on appeal.[16] Because Ortiz failed to object, his complaints were not preserved with respect to all the challenges except for the complaint raised in point of error three, which we shall discuss below.

Ortiz also argues that counsel's failure to object in these instances constitutes ineffective assistance. If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been legitimate trial strategy, we will defer to counsel's decisions and deny relief on

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(...continued)
1996).

[16] *Ladd v. State*, 3 S.W.2d 547, 562 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000); *Purtell v. State*, 761 S.W.2d 360, 365 (Tex. Crim. App. 1988), *cert. denied*, 490 U.S. 1059 (1989).

an ineffective assistance claim on direct appeal.[17] Counsel's reasons for failing to object do not appear in the direct appeal record. And it is possible for counsel to have legitimate reasons for declining to object to a trial court's granting of a State's challenge for cause.[18] Accordingly, we deny relief on Ortiz's ineffective assistance claims. Points of error two, nine, ten, and thirteen are overruled.

We now turn to point of error three, in which an objection was made. Ortiz claims that venire member Deporto was excused in violation of *Witt*. During general voir dire, the trial court addressed the subject of conscientious scruples against the death penalty, eventually asking jurors who had such scruples to approach the bench:

> I am going to ask you some questions about your convictions regarding the death penalty. Be assured that I am not now assuming that you will find the defendant guilty of capital murder or of any other crime in this case. Nevertheless, it is necessary to learn your state of mind about

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[17] *Thompson v. State*, 9 S.W.2d 808, 813-814 (Tex. Crim. App. 1999).

[18] *See Butler v. State*, 872 S.W.2d 227, 242 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1157 (1995).

> capital punishment in general, to determine whether you have an open mind as regards what might be a just and proper sentence in a capital case if the defendant in that case is found guilty as charged.
>
> So I am asking about your state of mind regarding capital murder in general. I am not asking in this next question what you think would be a just penalty in this case or any particular case. I'm not at this time even asking you about your opinion as regards the death penalty in a retaliation capital murder case. And I am most especially not asking what you might think would be a just verdict in this case – in this particular case. *I am asking, rather, whether for religious or philosophical or any other reason you believe that the death penalty should never be inflicted in any case, regardless of what the evidence might be.*
>
> In answering this next question, keep in mind that the circumstances and motives for the commission of crimes, including capital murder, are unlimited. Place a check mark by your answer, yes or no. Do you have conscientious scruples in regard to the infliction of death for a person convicted of capital murder? Yes or no? If you have answered the proceeding [sic] question yes, come up to the bench now.

(Emphasis added). Deporto was one of the prospective jurors who responded to the trial court's invitation. After Deporto

introduced herself at individual voir dire, the following exchange occurred:

> [DEPORTO]: I have seen other murder cases and have agreed with the death penalty, but I don't feel I could bring a death penalty for somebody, to put that pressure on me.
>
> [COURT]: Ma'am, it's not a question right now of how you feel about your serving as a juror. Right now, are you opposed to the death penalty in all cases?
>
> [DEPORTO]: No, sir.
>
> [COURT]: Could you ever, sitting as a juror, no matter – no matter what the evidence showed, vote to inflict the death penalty?
>
> [DEPORTO]: No, sir.
>
> [COURT]: Anybody want to ask a further question.

Neither the State nor the defense accepted the trial court's invitation to ask additional questions. The State then challenged for cause, the trial court granted the State's challenge, and Ortiz objected.

Initially, we address the State's contention that Ortiz

failed to preserve error because he did not obtain a ruling on his objection. The State relies upon Texas Rule of Appellate Procedure 33.1, which requires, among other things, that the record show "the trial court...ruled on the...objection...either expressly or implicitly." We have held that an objection after a challenge for cause is sustained is by itself sufficient to preserve error.[19] We see no reason to depart from our prior precedent to impose a requirement that a ruling be obtained on an objection leveled immediately after a challenge for cause is granted. So long as the objection is made immediately after the challenge is granted, the discharge of the prospective juror from service is tantamount to an adverse ruling on the objection.

We turn to the merits. Under *Witt*, a prospective juror may be excused for cause if her views about the death penalty would substantially impair the performance of her duties as a juror in accordance with her instructions and oath.[20] Ortiz contends that Deporto's negative answer to the trial court's question, "Could you ever, sitting as a juror, no matter – no

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[19] *Barefield v. State*, 784 S.W.2d 38, 41 (Tex. Crim. App. 1989), *cert. denied*, 497 U.S. 1011 (1990).

[20] 469 U.S. at 424.

matter what the evidence showed, vote to inflict the death penalty?" was correct because, at that point in the trial, she had not even found Ortiz guilty. Ortiz's contention is that the question as worded asks the juror if he can answer the special issue in the State's favor no matter what the evidence shows. Ortiz concludes that, as a result, the record fails to show substantial impairment. We disagree.

The trial court's question to Deporto, asking whether she could vote to inflict the death penalty, was not clearly worded, and any answer to that question, in isolation, would be inconclusive on the question of whether a prospective juror is challengeable under *Witt*. However, the trial court had earlier phrased the issue clearly and correctly (see italicized portion of trial court's statements), and the question directed specifically at Deporto was asked in the context of a juror who had already expressed doubt about her ability to personally assess the death penalty. A prospective juror is challengeable for cause under *Witt* if she could never personally impose the death penalty, regardless of the facts of the case, even though she might support imposition of the death penalty in the abstract or if

someone else imposed it.[21] Although the trial court's question to Deporto was ambiguous, the record in this case was sufficient for the trial court to believe that Deporto could never personally vote in a such a manner that the death penalty would be assessed. The trial court did not abuse its discretion in granting the State's challenge for cause. Point of error three is overruled.

III. JURY CHARGE

A. *Ex Post Facto* violation / wrong version of statute

In his first point of error, Ortiz claims the trial court's retroactive application of the retaliation statute to his case violated the *ex post facto* clause of the United States Constitution. He explains that at the time that he allegedly committed this offense, § 36.06 criminalized harming or threatening to harm another for his "service" as a public servant, witness, prospective witness, or informant. But by the time of Ortiz's trial, the statute had been changed to criminalize harming or threatening to harm another for his "service or status" as one of those named persons. At Ortiz's trial, the

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[21] *Robinson v. State*, 851 S.W.2d 216, 227-228 (Tex. Crim. App. 1991), *cert. denied*, 512 U.S. 1246 (1994).

judge charged the jury with the amended definition of retaliation rather than the definition in effect at the time of the offense.

Ortiz's argument is misplaced. Both the federal and state constitutions prohibit the promulgation of any "ex post facto law."[22] This prohibition "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'"[23] In both provisions, the language is directed at the Legislature, not the courts. In *Ieppert v. State*,[24] we did not appear to appreciate the distinction, but that failure was understandable in light of the Supreme Court's case in *Bouie v. City of Columbia*,[25] which stated that due process prohibited the judiciary from achieving, through construction of a statute, the exact same consequence that would be prohibited by the *ex post facto* clause if the Legislature had so acted. Recently, the Supreme Court held this

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[22]. *See* United States Constitution, Article I, §10; Texas Constitution, Article I, §16.

[23] *Johnson v. United States*, 529 U.S. 694, 699 (2000), *quoting Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

[24] 908 S.W.2d 217, 220 (Tex. Crim. App. 1005).

[25] 378 U.S. 347, 353-354 (1964).

statement to be *dicta* and clarified that the *ex post facto* clause does not apply to the judiciary, and due process does not incorporate all of the *ex post facto* clause's strictures.[26] In holding that the protections are not coextensive, the Court pointed to "important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other."[27] Indeed, the Supreme Court has indicated that an *ex post facto* problem does not arise from a trial court's erroneous retroactive application of a statute, but only if the statute itself has retroactive effect.[28]

So in order to prevail on his *ex post facto* claim, Ortiz would have to show that § 36.06 itself operates retroactively,[29] rather than that the trial court retroactively applied it. He does not do so. He does not even contend that § 36.06

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[26] *Rogers v. Tennessee*, 532 U.S. 451, __,121 S. Ct. 1693, 1698-1700 (2001).

[27] *Id.* at 1699.

[28] *Johnson v. United States*, 529 U.S. 694, 701-702 (2000)(because new statute did not apply retroactively, no *ex post facto* question arises; only question is whether the old statute authorized the trial court's action).

[29] *Id.*

itself operates retroactively, and our review of the statute confirms that it does not. We find no *ex post facto* violation in this case.

Ortiz's point of error could also be construed as arguing that the trial court's charge to the jury was erroneous because it relied on the wrong version of the statute. With this contention, we agree. The record reflects that the judge charged the jury on the current version of § 36.06 rather than the version in effect at the time of the offense.

Since Ortiz did not object to the charge on this basis, we review this error for "egregious harm."[30] Egregious harm exists when the defendant has been denied a fair and impartial trial.[31]

The charge permitted the jury to convict Ortiz if it found that he had killed Garcia in retaliation for his "service or status" as a prospective witness, but it should have only permitted conviction for killing Garcia on account of his "service" as a prospective witness. While this charge did broaden the scope

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[30] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g).

[31] *Id.*

of the offense, the facts of this case do not reflect that Ortiz suffered egregious harm. As noted *supra* in point of error four, the evidence demonstrated that Garcia was a prospective witness against Ortiz because he had been involved in a robbery with Ortiz and had already been identified by one of the robbery victims. A rational trier of fact could conclude from this evidence that Ortiz acted in "retaliation" because Ortiz knew that Garcia had been involved in the robbery with him.

This evidence supports a conclusion that Ortiz murdered Garcia due to either his status or his service as a prospective witness. As explained in point of error four, some redundancies exist in the statute with regard to the phrase "prospective witness." This is also true when the words "status" and "service" are considered. With the other options in the statute – public servant, witness, and informant – there is a clear difference between that person's status versus his service. But with a "prospective witness," the line is blurred, since the word "prospective" denotes a future event. There is little difference between a prospective witness' status and his service. As a result, we cannot conclude that Ortiz was egregiously harmed by the erroneous charge. We overrule Ortiz's first point of error.

B. Requested suicide instruction

In point of error five, Ortiz contends that the trial court erred in denying his request for an instruction in the jury charge on suicide as a defense to the crime. Ortiz asked the trial court to submit the following instruction to the jury: "If you find from the evidence that the deceased, Gerardo Garcia, came to his death by a wound inflicted by himself with his own hands, or you have a reasonable doubt thereof, you will acquit the defendant." Ortiz contends that the trial court erred in refusing the instruction because the accused has the right to an instruction on any defensive issue raised by the evidence.

But a defensive instruction is not required when the issue in question is not a statutorily-enumerated defense and merely serves to negate elements of the State's case.[32] For this reason, we have held that trial courts are not required to give jury instructions on "independent impulse"[33] or "alibi."[34] There

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[32] *Solomon v. State*, 49 S.W.3d 356, 369 (Tex. Crim. App. 2001); *Giesberg v. State*, 984 S.W.2d 245, 248-251 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1147 (1999).

[33] *Solomon*, 49 S.W.3d at 369.

[34] *Giesberg*, 984 S.W.2d at 248-251.

is no suicide defense in the Penal Code (or in any other statute) to the crime of capital murder, and the defense's suicide theory simply negates elements of the State's case (i.e. whether Ortiz killed Garcia as the State has alleged). The trial court did not err in denying the instruction. Point of error five is overruled.

IV. EXCULPATORY EVIDENCE

In point of error six, Ortiz contends that the State suppressed a secret deal with Hector in exchange for Hector's testimony.[35] Ortiz relies solely upon evidence in the trial record; he did not raise the claim in a motion for new trial. The evidence presented at trial does not prove that there was a deal between Hector and the State; it shows merely that the State took various measures to protect Hector's safety so that he would not be killed before he testified. And to whatever extent that the evidence presented at trial might support the existence of a deal, that evidence was before the jury. Ortiz fails to show that the State suppressed exculpatory evidence. Point of error six is overruled.

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[35] *See Brady v. Maryland*, 373 U.S. 83 (1963)(due process violated by the government's suppression of exculpatory evidence); *Bagley v. United States*, 473 U.S. 667 (1985)(*Brady* applies to impeachment evidence).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

In points of error seven, eight, and twelve, Ortiz contends that he received ineffective assistance of counsel at trial. To succeed on an ineffective assistance claim, the defendant must show: (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense.[36] To show deficient performance, the defendant must prove by a preponderance of the evidence that his counsel's representation fell below the standard of professional norms.[37] To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[38]

A. Membership in gang

In point of error seven Ortiz contends that counsel performed ineffectively by failing to object to evidence of Ortiz's affiliation with the Texas Syndicate and to the prosecutor's comments about this gang affiliation in opening

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[36] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[37] *Id.* at 688.

[38] *Id.* at 694.

statement and closing arguments. When an ineffective assistance claim alleges that counsel was deficient in failing to object to the admission of evidence, the defendant must show, as part of his claim, that the evidence was inadmissible.[39] Ortiz claims the Texas Syndicate evidence was irrelevant under Texas Rule of Evidence 402 and constituted impermissible character evidence under Texas Rule of Evidence 404. We find that the evidence was admissible and that the State's comments, based upon such evidence, were proper.

Ortiz complains about testimony relating to the Texas Syndicate and Ortiz's association therewith. The evidence can be summarized as showing the following: (1) the Texas Syndicate has conflicts with other gangs and must be segregated in the jail system, (2) Ortiz is a high ranking member of the Syndicate, (3) as a high ranking member, Ortiz controlled the Syndicate tank, was the contact person with jail officials for all members of the tank, controlled the exercise of jail privileges including what items were ordered at the commissary, conducted numerous meetings with other gang members, and could have other inmates killed, and (4) Hector was a prospect

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[39] *See Jaubert v. State*, 74 S.W.3d 1 (2002).

being brought into the Syndicate by Ortiz.

Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....[40]

Gang membership evidence is admissible under Rule 404(b)(and Rule 402) if it is relevant to show a noncharacter purpose that in turn tends to show the commission of the crime.[41]

The testimony in question served a variety of noncharacter purposes relevant to showing Ortiz's guilt of the crime. Conflicts between gangs explained why the Texas Syndicate had its own tank. Ortiz's status in the gang proved a variety of things. First, his high ranking in a criminal gang explained his ability to smuggle heroin into the jail and tended

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[40] Tex. R. Evid. 404(b). Ortiz concedes that he was given the proper notice of the State's intent to offer this evidence.

[41] *See Vasquez v. State*, 67 S.W.3d 229, 239-240 (Tex. Crim. App. 2002); *Medina v. State*, 7 S.W.3d 633, 643-644 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1102 (2000).

to show that the heroin was Ortiz's, not Garcia's. Second, Ortiz's high ranking in the organization and his control over the tank tended to prove his opportunity and ability to carry out the crime. It explained Ortiz's ability to gain the cooperation of other inmates to restrain Garcia and force an injection of heroin without leaving signs of a struggle. Third, the evidence tended to rebut defense impeachment of the State's witnesses. Ortiz's position in the Texas Syndicate explained inconsistencies in Hernandez's and Hector's statements by showing that statements favorable to Ortiz were motivated by their fear of him. The evidence also tended to rebut the defense claim that a secret deal existed between the State and Hector by explaining why the State declined to incarcerate Hector and why Hector testified on cross-examination that there was a deal. Point of error seven is overruled.

B. Attempt to smuggle heroin into the jail

Ortiz next contends that counsel performed ineffectively by failing to object to evidence that Ortiz attempted to have heroin smuggled into the El Paso County jail. But the State did not introduce this evidence until *after* defense counsel used the drug smuggling offense to impeach Hector's credibility and to argue that he had entered into a secret deal with the State. It

was then that the State proved the connection between that offense and Ortiz's orders. Defense counsel's use of the extraneous offense to impeach Hector was clearly trial strategy. Once that trial strategy was invoked, defense counsel could have rationally believed that he was not in a position to prevent the evidence of Ortiz's involvement. Ortiz's role gave a more complete picture of the offense and helped explain why the State was willing to unilaterally forego prosecuting Hector.

Moreover, the evidence showed a scheme or plan by Ortiz to import heroin into the jail – which in turn tends to substantiate the State's theory that Ortiz killed Garcia with heroin. In addition, the drug smuggling offense tended to show Hector's close association with Ortiz. While such evidence has some tendency to show that Ortiz is a criminal generally, given the legitimate purpose of the evidence, the trial judge did not abuse his discretion in finding that the evidence was admissible under R. 403.[42] Point of error eight is overruled.

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[42] Tex. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues,

(continued...)

C. Hearsay

In point of error twelve, Ortiz contends that counsel performed ineffectively by failing to object to hearsay statements relayed by Special Agent Lott. Ortiz complains that Lott relayed hearsay evidence from an ex-girlfriend of Garcia and from a fingerprint examiner that connected Garcia to several bank robberies.

Trial counsel's reasons for failing to object do not appear in the record. Arguably, the evidence was admissible to show why Lott's investigation focused upon Garcia and Ortiz. When the State first introduced the statements from Garcia's ex-girlfriend, defense counsel objected on the basis of hearsay, the objection was sustained, and the trial court gave the jury an instruction to disregard. The State then asked Lott whether he knew the statements were true (he did not) and whether the statements had an impact on his investigation (they did).

Moreover, had defense counsel pursued a hearsay objection on these topics, the State might have chosen to

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(...continued)

> or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

introduce the evidence directly through Ortiz's ex-girlfriend and the fingerprint examiner. Defense counsel might have believed that such direct evidence would have a more powerful and adverse effect on the jury than the evidence the State was content to offer. Point of error twelve is overruled.

The judgment of the trial court is affirmed.

DATE DELIVERED: September 25, 2002

PUBLISH

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 73,692

RICARDO ORTIZ, Appellant

v.

THE STATE OF TEXAS

APPEAL FROM
EL PASO COUNTY

WOMACK, J., filed a concurring opinion.

I join the Court's opinion, including its rejection of the appellant's insufficient-evidence argument. There is an additional, historical support for the Court's construction of the term "prospective witness" in the retaliation statute. The term was added in 1983 to cure a defect that this court had found in 1982.

In its original enactment in 1973, the offense of retaliation was defined as conduct "in retaliation for or on account of the service of another as a public servant, witness, or

informant."[43] Neither "witness" nor "informant" was defined, possibly because the terms were not in the proposed penal code of 1970, which limited the offense of retaliation to acts against public servants or former public servants.[44]

In 1982 we decided that "the term 'witness' means 'one who *has* testified in an official proceeding,' and does not include a mere 'prospective witness.'"[45] We noted the comment of drafters of the penal code.[46] The comment was, "'Witness' is not defined, but presumably the term will be construed to mean only one who testifies before an official proceeding, *cf.* Section 36.05; otherwise, location of the 'witness' part of the offense in this chapter would be inappropriate."[47] We also

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[43]Penal Code Act, 63d Leg., R.S., ch. 399, § 1, sec. 36.06(a), 1973 Tex. Gen. Laws 883, 948.

[44]*See* STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE: A PROPOSED REVISION § 36.06 (Final Draft 1970).

[45]*Benson v. State*, 681 S.W.2d 708, 711 (1982) (on original submission).

[46]*Id.*, at 710.

[47]Seth R. Searcy & James R. Patterson, *Practice*

(continued...)

compared the retaliation statute (section 36.06) with the tampering-with-witness statute (section 36.05), which defined the offense as acts toward "a witness or prospective witness."[48] Our holding was made "[i]n light of the fact that the legislature has, by statute, differentiated offenses against 'witnesses' only and 'witnesses and prospective witnesses.'"[49]

The next legislature eliminated the discrepancy between the statutes. It did so by amending the retaliation statute to protect "prospective witnesses," just as the tampering statute did.[50]

We know, from legislative history, the reason for the inclusion of "prospective witnesses" in the tampering statute: "Note that the person whom the actor attempts to influence

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(...continued)
Commentary, 4 VERNON'S ANNOTATED CODES: PENAL CODE 22, 23 (1974).

[48]*Benson*, 661 S.W.2d at 710 (quoting Penal Code Act, 63d Leg., R.S., ch. 399, § 1, sec. 36.05(a), 1973 Tex. Gen. Laws 883, 947).

[49]*Id.*, at 711.

[50]Act of June 19, 1983, 68th Legislature, R.S., ch. 558, § 4, 1983 Tex. Gen. Laws 3237, 3238.

need not actually be a witness. Tampering with a prospective witness creates a risk of interfering with an official proceeding even if the person bribed or threatened has not been officially called to offer evidence."[51] I think that the legislature amended the retaliation statute for the same reason. To construe the statute as this appellant proposes would be contrary to that policy. The text of the statute does not make the appellant's proposal any more likely than the construction we have given it, and our construction is in accord with the legislative history, while his is not.

En banc.
Delivered September 25, 2002.
Publish.

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[51]STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, *supra* note 2, § 36.05 Committee Comment. When the committee's proposals were enacted without substantive change, as the tampering statute was, the drafters' comments are the most important expression of the legislative history. *See Aguirre v. State*, 22 S.W.3d 463, 471 (Tex. Cr. App. 1999).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO.73,692

RICARDO ORTIZ, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM EL PASO COUNTY

KELLER, P.J., *filed a concurring opinion.*

CONCURRING OPINION

We have previously addressed the meaning of "prospective witness." In *Morrow v. State*, we held that the retaliation statute does not require the initiation of official proceedings for one to be a prospective witness.[52] Although the Court does not disturb this holding, it should be noted that its opinion today conflicts with some of the distinctions drawn by *Morrow* between prospective witnesses and informants. The

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[52] 862 S.W.2d 612, 613 (Tex. Crim. App. 1993).

Court effectively disavows any suggestion in *Morrow* that a certain level of cooperation or visibility is required for a person with relevant information to become a prospective witness.

I agree with the Court's analysis and join the Court's opinion.

KELLER,

Presiding Judge

Date filed: September 25, 2002
Publish

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

November 13, 2002

243RD DISTRICT COURT- 980D08993
RE: Case No. 73,692
STYLE: ORTIZ, RICARDO

On this day the Appellant's Motion for Rehearing was denied.

Troy C. Bennett, Jr., Clerk

James D. Lucas
303 TEXAS AVENUE
SUITE 806
EL PASO, TX 79901

(2)

MAR 2 5 2003
OFFICE OF THE CLERK

No. 02-1189

IN THE
SUPREME COURT OF THE UNITED STATES

RICARDO ORTIZ,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
to the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a Texas statute which permits the prosecution to assert a challenge for cause to a prospective capital juror where "the juror has conscientious scruples in regard to the infliction of the punishment of death" is facially invalid under the Sixth Amendment where the state courts have construed the statute as a basis for disqualification only to the extent constitutionally permitted by *Wainwright v. Witt*, 469 U.S. 412 (1985).

2. Whether the lower court erred by rejecting Petitioner's allegation that his trial attorney rendered ineffective assistance of counsel when he did not object to the prosecution's challenges for cause to thirteen prospective jurors who indicated that they opposed the death penalty in all circumstances.

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SUP. CT. R. 10 13

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Ricardo Ortiz was convicted and sentenced to death by a Texas jury for the capital murder of fellow jail inmate Gerardo Garcia. The Texas Court of Criminal Appeals affirmed Ortiz' conviction and death sentence on direct appeal, and he now seeks certiorari review from this Court. In particular, Ortiz alleges that the Texas statute governing challenges for cause to prospective capital jurors who harbor "conscientious scruples" against the death penalty is facially unconstitutional in light of this Court's decisions in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). He also complains that his trial attorney rendered ineffective assistance of counsel when he did not object to the prosecution's challenges for cause to thirteen prospective jurors who indicated that they opposed capital punishment and could not return a death sentence. However, as discussed below, the Court of Criminal Appeals correctly concluded that Ortiz' arguments were without merit. Ortiz does not present a compelling reason for this Court to review his claims and certiorari review should be denied.

STATEMENT OF THE CASE

On August 17, 1997, Gerardo Garcia died in the El Paso County Jail of a massive heroin overdose. The evidence adduced at trial established that the heroin had been involuntarily-injected into Garcia by Ortiz, who was a high-ranking member of the Texas Syndicate prison gang, because Ortiz believed that Garcia had implicated him in various bank robberies. According to one witness, Ortiz indicated that he used heroin to kill Garcia in order to make his death look like a suicide.

I. Jury Selection

Jury selection for Ortiz' trial began on April 20, 1999. 11 RR 6.[1] Prior to individual voir dire examination by the parties, the trial court addressed the assembled venire and discussed various questions included on the juror questionnaires. *Id.* at 6-97. Among other things, the trial court inquired whether any of the jurors opposed the death penalty in all cases:

> I am now going to ask you some questions about your convictions regarding the death penalty. Be assured that I am not now assuming that you will find the defendant guilty of capital murder or of any other crime in this case. Nevertheless, it is necessary to learn your state of mind about capital punishment in general, to determine whether you have an open mind as regards what might be a just and proper sentence in a capital case if the defendant in that case is found guilty as charged.
>
> So I am asking about your state of mind regarding capital punishment in general. I am not asking in this next question what you think would be a just penalty in this case or any particular case. . . . I am asking, rather, whether for religious or philosophical or any other reason you believe that the death penalty should never be inflicted in any case, regardless of what the evidence might be.
>
> In answering this next question, keep in mind that the circumstances and motives for the commission of crimes, including capital murder, are unlimited. Place a check mark by your answer, yes or no. Do you have conscientious scruples in regard to the infliction of death for a person

---

[1] "RR" refers to the "Reporters Record" of transcribed trial proceedings, preceded by volume number and followed by page numbers.

convicted of capital murder? Yes or no?

If you have answered the proceeding question yes, come up to the bench now.

Id. at 65-66. Twenty venire members came forward in response to the court's question and nineteen of those were ultimately excused from jury service based on the prosecution's challenge for cause. *Id.* at 66-81. Of those nineteen, defense counsel only raised an objection to the disqualification of two prospective jurors. *Id.* at 77-80.

Of the seventeen jurors excused for cause where defense counsel did not object, Ortiz cites the testimony of the following thirteen venire members in his petition for writ of certiorari.

1. Venire member Reid

[Defense counsel]: Mr. Reid.

THE COURT: Yes, sir.

[Juror]: In regards to the question you just asked –

THE COURT: Yes.

[Juror]: – about the death penalty, I checked on the yes.

THE COURT: You have conscientious scruples regarding –

[Juror]: Yes.

THE COURT: Anybody want to ask him any questions? Take your seat, sir.

State challenge?

[Prosecutor]: Yes.

THE COURT: All right. Court grants the challenge. Next person.

11 RR 66-67.

2. Venire member Bonilla

[Juror]: 57, Elizabeth Bonilla. I think only God has a right to take someone's life.

THE COURT: You have conscientious scruples against infliction of the death penalty in all cases?

Anybody want to ask questions?

[Defense counsel]: No questions.

[Prosecutor]: No.

THE COURT: Take your seat, ma'am.

[Prosecutor]: Challenge.

THE COURT: Court grants the State's challenge.

11 RR 67.

3. Venire member Berlit

[Juror]: Chris Berlit, B-E-R-L-I-T, number 83. I do have reservations to the death penalty.

THE COURT: What do you mean by "reservations"?

[Juror]: I've been born, raised and educated in Europe, and I believe that an appropriate punishment would be life in prison.

THE COURT: The question not really is that. Do you believe the death penalty unjustified in all cases?

[Juror]: Yes. Yes, sir.

THE COURT: Questions?

[Prosecutor]: State challenges.

THE COURT: State's challenge is granted.

11 RR 69.

4. Venire member Reta

[Juror]: Number 127, Diana Reta.

[Prosecutor]: 127, Judge.

[Juror]: And I answered yes to conscientious scruples in regard to the death penalty.

THE COURT: Is this a religious conviction or –

[Juror]: It's just a moral, personal –

THE COURT: You're opposed to the death penalty in all cases?

[Juror]: Yes, sir.

THE COURT: Questions, State?

[Prosecutor]: No, Your Honor.

THE COURT: Defense?

[Defense counsel]: No questions, Your Honor.

THE COURT: Next person.

[Prosecutor]: State is going to challenge that juror.

THE COURT: Granted.

11 RR 69-70.

5. Venire member Lopez

[Juror]: 132. Yvonne Lopez.

THE COURT: Ms. Lopez, what is your statement to the Court?

[Juror]: I would have a problem with the death penalty.

THE COURT: Anybody would have a problem with it.

[Juror]: Personally, I would have a problem. Yes, I'm a Catholic, and only God gives life, and only God takes away life.

THE COURT: I'm just trying to tell you, it's a problem for anybody. But do you have conscientious scruples against the death penalty in –

[Juror]: Yes.

THE COURT: – any and all cases?

[Juror]: Most probably in all cases.

THE COURT: In all cases?

[Juror]: I think so. I've never been faced with it, but I think I would have a problem.

THE COURT: It's not a question of having a problem. I'm not trying to –

[Juror]: I answered.

THE COURT: I'm not trying to contradict you. Anybody that has any sensibility would have a problem with the issue. The question is, are you opposed to the death penalty in all cases, regardless

of what the facts might show?

[Juror]: Yes.

THE COURT: Questions?

[Prosecutor]: No questions.

[Prosecutor]: No.

[Defense counsel]: No questions.

THE COURT: Take your seat.

[Prosecutor]: State challenges. Judge, State challenged that last juror.

THE COURT: All right. Granted. I've forgotten the name.

11 RR 70-72.

6. Venire member Herrick

[Juror]: Jeffery Herrick, 123.

THE COURT: Mr. Herrick, you have – I'm not going put [*sic*] words in your mouth.

[Juror]: I'm opposed to the death penalty based on my convictions as a Quaker.

THE COURT: Is that in any and all cases?

[Juror]: Yes.

THE COURT: Questions?

[Prosecutor]: I think he'd been previously excused.

[Prosecutor]: No, he was not.

[Juror]: No, I just asked for permission to come in late.

THE COURT: Have your seat, sir.

[Prosecutor]: Move to challenge him, Your Honor.

THE COURT: Granted.

11 RR 72-73.

7. Venire member Escamilla

[Juror]: 56, Robert Escamilla.

THE COURT: Yes, sir.

[Juror]: I don't believe in the death penalty.

THE COURT: You don't believe it's justified in any case?

[Juror]: No, sir.

[Prosecutor]: No questions.

[Defense counsel]: No questions.

[Prosecutor]: He answered affirmatively.

THE COURT: He said he didn't believe it was justified in any case.

[Prosecutor]: We have no questions.

[Prosecutor]: State challenges.

THE COURT: Granted.

11 RR 74.

8. Venire member Cortinas

[Juror]: Dolores Cortinas, juror 97. Sir, I do not believe in the death penalty.

THE COURT: You do not believe in the death

penalty for any case whatsoever?

[Juror]: No, sir.

[Prosecutor]: No questions, Your Honor.

[Defense counsel]: No questions.

THE COURT: You may take your seat.

[Prosecutor]: State challenges.

THE COURT: All right. Granted.

11 RR 74-75.

9. Venire member Estala

[Juror]: Andre Estala, number 11. And I do have a conscientious scruple about this.

THE COURT: What is your statement about the death penalty?

[Juror]: I don't believe in it, sir, in any degree.

THE COURT: In any kind of case whatsoever?

[Juror]: That's correct.

THE COURT: You believe it's never justified?

[Juror]: Never justified.

[Prosecutor]: No questions, Your Honor.

[Defense counsel]: No questions.

THE COURT: You may return to your seat.

[Prosecutor]: State moves to challenge.

THE COURT: Granted.

11 RR 75-76.

10. Venire member Portillo

[Juror]: Jorge Portillo, 154.

THE COURT: You are Jorge Portillo. What is your statement on the death penalty?

[Juror]: I don't believe it's right.

THE COURT: Never justified under any circumstances?

[Juror]: Two wrongs do not make a right, sir.

[Prosecutor]: No questions.

[Defense counsel]: No questions.

THE COURT: You may take a seat.

[Prosecutor]: State challenges.

THE COURT: All right.

[Prosecutor]: Is that granted – I'm sorry – on the last juror?

THE COURT: Granted.

11 RR 76.

11. Venire member Gallegos

[Juror]: Rose Gallegos, number 112.

THE COURT: Make your statement as regards the death penalty, Mrs. Gallegos.

[Juror]: As a practicing Catholic, I do not believe in the death penalty.

THE COURT: You don't believe it is justified in any case whatever?

[Juror]: No, sir.

[Prosecutor]: No questions.

[Defense counsel]: No questions, Your Honor.

THE COURT: Take your seat, please, ma'am.

[Prosecutor]: State will challenge.

THE COURT: You do challenge?

[Prosecutor]: Yes.

THE COURT: Granted.

11 RR 76-77.

12. Venire member Palomo

[Juror]: Number 142.

THE COURT: You are Ms. Palomo?

[Juror]: Yes. I oppose the death penalty. I believe that the Lord gives us life, and he's the only one that's supposed to –

THE COURT: You're opposed to the death penalty, no matter the circumstances?

[Juror]: Yes. Yes.

[Prosecutor]: No questions.

[Defense counsel]: No questions, Your Honor.

THE COURT: Take your seat, please, ma'am.

[Prosecutor]: State challenges this juror.

THE COURT: Granted.

11 RR 77.

13. Venire member Caballero

[Juror]: Adriana Caballero, 108.

> THE COURT: Make your statement as to what – make your statement. What is your belief about the death penalty?
>
> [Juror]: I am strongly opposed to the death penalty.
>
> THE COURT: You think that the death penalty should never be inflicted in any case whatsoever, regardless of the facts?
>
> [Juror]: Yes.
>
> [Prosecutor]: No questions.
>
> [Defense counsel]: No questions.
>
> THE COURT: You may take your seat.
>
> [Prosecutor]: State would challenge, Your Honor.
>
> THE COURT: Granted.

11 RR 80-81.

II. Disposition Below

On appeal to the Court of Criminal Appeals, Ortiz argued for the first time that a Texas statute permitting disqualification of capital jurors who have "conscientious scruples in regard to the infliction of the punishment of death for crime" was facially unconstitutional under the Sixth Amendment. *See* Appeal Brief at 69-73, *Ortiz v. State*, No. 73,692 (Tex. Crim. App. filed June 25, 2001). In particular, he complained that the statute was inconsistent with this Court's decisions in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). *Id.* However, the state court rejected this facial challenge, noting that it had previously held that the statute provided a means for disqualification "'only to the extent constitutionally permitted by *Witt*.'" *Ortiz v. State*, 93 S.W.3d 79, 88 (Tex. Crim. App. 2002) (quoting *Ramos v. State*, 934 S.W.2d 358, 366 (Tex. Crim. App.

1996)). The court therefore found that, "[h]aving already narrowed the scope of the statute to what is constitutionally permissible, we perceive no further basis for complaint." *Id.*

Ortiz also contended that, in his case in particular, the thirteen jurors cited above were impermissibly excused from jury service in violation of *Witherspoon* and *Witt*. *See* Appeal Brief at 73-77, *Ortiz*, *supra*. However, the Texas court concluded that these allegations were not preserved for appellate review because "[a] party must object to the granting of a challenge for cause before he can complain of that action on appeal." *Ortiz*, 93 S.W.3d at 88 (footnote omitted). It therefore declined to reach the merits of Ortiz' constitutional complaint.

In an apparent attempt to circumvent the procedural bar, Ortiz also argued that his trial attorney's failure to object to the prosecution's challenges for cause to the excused venire members constituted ineffective assistance of counsel. *See* Appeal Brief at 119-24, *Ortiz*, *supra*. However, the Court of Criminal Appeals declined to find a Sixth Amendment violation on the record presented. *Ortiz*, 93 S.W.3d at 88-89. The court noted that it was "possible for counsel to have legitimate reasons for declining to object" to the prosecution's challenges. *Id.* at 89. Because the record was silent regarding why counsel chose not to object to disqualification of the thirteen venire members cited by Ortiz, the court stated that it would "defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." *Id.*

ARGUMENT

I. The Questions Presented For Review Are Unworthy Of The Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10. In the instant case, Ortiz fails to advance a "compelling reason" for this Court to review his case, and none exists. Indeed, the opinion

issued by the lower court involved only a proper and straightforward application of established constitutional principles. Moreover, this Court does not have jurisdiction to review those arguments which the Texas court found were defaulted pursuant to an adequate and independent state procedural bar. The petition therefore presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

II. The Texas Statute Permitting The Prosecution To Challenge A Prospective Capital Juror For Cause Where The Juror Voices "Conscientious Scruples" Against The Death Penalty Is Not Unconstitutional.

In Ortiz' first question presented for review, he complains that Article 35.16(b)(1) of the Texas Code of Criminal Procedure is facially unconstitutional under the Sixth Amendment. *See* Petition at 17-23. As noted above, that statute permits the prosecution to challenge a prospective capital juror for cause where "the juror has conscientious scruples in regard to the infliction of the punishment of death for crime." TEX. CRIM. PROC. CODE ANN. art. 35.16(b)(1) (Vernon1996). According to Ortiz, this law effectively disqualifies jurors who voice only general objections to the death penalty and is therefore inconsistent with this Court's decisions in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). He also argues that the trial court applied the defective statute to his case and improperly excused several qualified jurors.

However, as discussed below, Ortiz' facial challenge to Article 35.16 must fail because the Texas courts have construed the statute to permit venire members to be disqualified *only* to the degree constitutionally allowed by *Witt*. Furthermore, to the extent Ortiz seeks review of the manner in which the statute was applied to the jurors in his case, the Court of Criminal Appeals found his claims to be procedurally defaulted under the Texas contemporaneous objection rule. This Court therefore does not have jurisdiction to consider Ortiz' "as applied" challenge. For

these reasons, certiorari review should be denied.

A. Under the Court of Criminal Appeals' construction of Article 35.16(b)(1), a prospective capital juror may only be disqualified from service based on "conscientious scruples" where the juror's views on capital punishment would prevent or substantially impair the performance of her duties.

Ortiz' facial constitutional challenge to Article 35.16(b)(1) relies entirely on this Court's decisions in *Witherspoon* and *Witt*. In *Witherspoon*, this Court was faced with an Illinois statute which permitted a prospective capital juror who indicated "that he [had] conscientious scruples against capital punishment, or that he opposed the same," to be challenged for cause. 391 U.S. at 512. Pursuant to the statute, the State was routinely allowed to excuse jurors who expressed such reservations without specifically inquiring into whether those scruples would compel them to vote against the death penalty. *Id.* at 515. The Court determined that such a practice was improper and held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general opposition to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 521-22 (footnote omitted).

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court further clarified the standard to be used for assessing the propriety of a challenge for cause. That case involved the former Texas statute which prescribed that "'[a] prospective [capital] juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.'" *Id.* at 42 (quoting TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974)). The *Adams* Court concluded that the *Witherspoon* line of cases established

"the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 45. However, the Court went on to hold that the Texas statute at issue had been applied to the petitioner's case in such a way as to exclude jurors who were qualified to serve under *Witherspoon*. *Id.* at 49-51. In particular, the state courts had interpreted the statute so broadly that the prosecution had excluded venire members "who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." *Id.* at 49 (footnote omitted). The Court found that this expansive application of the statute could not be squared with the Sixth Amendment. *Id.* at 50.

In *Wainwright v. Witt*, this Court further refined the standard that had been "simplified" in *Adams* for evaluating a challenge for cause. *Witt*, 469 U.S. at 421. The Court summarized the governing rule as follows:

> Th[e] standard [for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment] is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with *Witherspoon*'s reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved:

> many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424-26 (internal footnotes omitted).

Turning to the instant case, it is apparent that the Texas statute passes constitutional muster. After *Adams* was decided, the Court of Criminal Appeals narrowed its construction of section 12.31(b) of the Penal Code so that it "[could not] be used . . . to exclude jurors on grounds broader than those permitted by the Supreme Court in *Witherspoon v. Illinois*." *Penry v. State*, 691 S.W.2d 636, 656 (Tex. Crim. App. 1985); *see also Clark v. State*, 881 S.W.2d 682, 686 (Tex. Crim. App. 1994); *White v. State*, 610 S.W.2d 504, 508 (Tex. Crim. App. 1981). The state courts concluded that *Adams* did not declare section 12.31(b) facially unconstitutional, but simply admonished the State because the statute had been applied too broadly.[2] *Clark*, 881 S.W.2d at 686; *Penry*, 691 S.W.2d at 656; *White*, 610 S.W.2d at 508. Nevertheless, in 1991, the Texas Legislature deleted the language confronted by the *Adams* Court. *Clark*, 881 S.W.2d at 685 n.1.

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[2]In *Adams*, the Court specifically noted that "the State could, consistently with *Witherspoon*, use § 12.31(b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the use of § 12.31(b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible." *Adams*, 448 U.S. at 48-49.

Article 35.16(b)(1) then became the only statutory basis for excluding prospective capital jurors who opposed the death penalty. As with section 12.31(b), the Court of Criminal Appeals has consistently interpreted the "conscientious scruples" provision of this statute to permit a venire member to be disqualified from service in a capital case *only* where the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Holberg v. State*, 38 S.W.3d 137, 141 (Tex. Crim. App.), *cert. denied*, 534 U.S. 972 (2001) (citing *Witt*, 469 U.S. at 424); *see also Ortiz*, 93 S.W.3d at 88; *Ramos v. State*, 934 S.W.2d 358, 366 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W.2d 482, 509 n.24 (Tex. Crim. App. 1996); *Wolfe v. State*, 917 S.W.2d 270, 275-76 (Tex. Crim. App. 1996); *Cuevas v. State*, 742 S.W.2d 331, 334 (Tex. Crim. App. 1987). Thus, the statute is coextensive with this Court's opinions in *Adams* and *Witt*. If a juror is qualified to serve under the constitutional standard articulated in those cases, he is likewise qualified to serve under Texas law. *See Ramos*, 934 S.W.2d at 365; *McFarland*, 928 S.W.2d at 509 n.24. Put another way, a juror cannot be disqualified under Article 35.16(b)(1) if he is acceptable under *Adams* and *Witt*. *Ortiz*, 93 S.W.3d at 88; *Ramos*, 934 S.W.2d at 365. Because the Texas courts have tethered the statute's requirements to the constitutional standards announced by this Court, it survives a facial constitutional challenge.[3] Ortiz' argument to the contrary is therefore without merit and undeserving of certiorari review.

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[3]Citing *Houston v. Hill*, 482 U.S. 451 (1987), Ortiz maintains that the Article 35.16(b)(1) is simply "not susceptible to a narrowing construction." Petition at 21. However, contrary to Ortiz' argument, it is completely reasonable for the Court of Criminal Appeals to define "conscientious scruples" as denoting views that would "prevent or substantially impair" a juror in the performance of his duties. After all, the phrase "conscientious scruples" is hardly self-defining. *See Witherspoon*, 391 U.S. at 515 n.9 (noting of a statute that permitted jurors to be excused based on "conscientious scruples" that "[w]hat matters is how [the phrases employed in this area] might be understood – or misunderstood – by prospective jurors").

B. This Court may not consider Ortiz' allegation that prospective jurors in his case were improperly excluded under *Witt* because the lower court's disposition of the claim was based on an adequate and independent state procedural ground.

Although Ortiz repeatedly characterizes the argument included in his petition as a "facial" challenge to the constitutionality of Article 35.16(b)(1), he also contends that the statute was improperly utilized to exclude thirteen prospective jurors in his case who were qualified to serve under *Witherspoon* and *Witt*. *See* Petition at 17-23. Ortiz seems to imply that the Court of Criminal Appeals simply ignored this additional complaint. *See, e.g., id.* at 19 ("Despite what it says, the Court of Criminal Appeals did not apply a narrowing construction to Article 35.16(b)1 in Petitioner's case"). However, a simple reference to the lower court's decision reveals that the court declined to consider the merits of Ortiz' "as applied" claim because of an independent state procedural default. The Texas court found that with regard to the thirteen jurors cited by Ortiz, "Ortiz did not object to the trial court's actions in granting the State's challenges." *Ortiz*, 93 S.W.3d at 88. For this reason, the court concluded that Ortiz had forfeited his claims:

> A party must object to the granting of a challenge for cause before he can complain of that action on appeal. Because Ortiz failed to object, his complaints were not preserved with respect to all the challenges. . . .

Id. This holding precludes independent review of Ortiz' constitutional allegations by this Court.

It is well settled that "this Court 'will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Lambrix v.*

Singletary, 520 U.S. 518, 522-23 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989) (holding that an adequate and independent state procedural default will bar federal habeas review of a claim absent a showing of cause and prejudice). This is so because the Court "in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix*, 520 U.S. at 523 (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)); *see also Sochor v. Florida*, 504 U.S. 527, 533 (1992) (noting and applying rule that "this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground"); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision").

Ortiz does not contest that the Texas contemporaneous objection rule constitutes an adequate and independent state procedural ground. Indeed, as the Fifth Circuit has repeatedly and correctly emphasized, this aspect of Texas law is firmly established and regularly followed by the state courts. *Smith v. Cockrell*, 311 F.3d 661, 683 (5th Cir. 2002); *Haley v. Cockrell*, 306 F.3d 257, 262 n.8 (5th Cir. 2002); *Styron v. Johnson*, 262 F.3d 438, 453 (5th Cir. 2001), *cert. denied*, 534 U.S. 1163 (2002); *Jackson v. Johnson*, 194 F.3d 641, 652 (5th Cir. 1999); *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999); *Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998); *Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997); *see also Wainwright v. Sykes*, 433 U.S. 72, 88 (1977) (noting the important function served by a state's contemporaneous objection rule). This Court may therefore not undertake review of this aspect of the lower court's decision and

certiorari review should be denied.[4]

III. The Lower Court Correctly Declined To Find That Ortiz' Trial Attorney Had Rendered Ineffective Assistance Of Counsel Based On The Record Presented During Direct Appeal.

In an apparent attempt to circumvent the state procedural bar, Ortiz argues that his trial attorney rendered ineffective assistance of counsel when he did not object to the prosecution's challenges for cause to the thirteen prospective jurors cited above.[5] *See* Petition at 23-26. He maintains that the record from voir dire reveals that his lawyers "clearly were unfamiliar with the decisions

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[4]Even if Ortiz' allegations were not jurisdictionally barred, they are without any substantive merit. The record reveals that the trial court specifically advised jurors that its inquiry was meant to identify whether any of the assembled venire members "believe[d] that the death penalty should never be inflicted in any case, regardless of what the evidence might be." 11 RR 65-66. All of the jurors identified in Ortiz' petition came forward in response to the court's question and expressed unwavering opposition to imposing capital punishment. *Id.* at 67-81. Twelve of the jurors explicitly confirmed that they would oppose the death penalty in any circumstance. *Id.* Only one juror, Andy Reid, simply answered "yes" to the court's question as to whether he had "conscientious scruples" regarding the death penalty. *Id.* at 67. However, Reid was the first venire member questioned by the court, immediately after the court had explained that by "conscientious scruples" it meant to reveal only those jurors who "believe[d] that the death penalty should never be inflicted in any case, regardless of what the evidence might be." The court was plainly in the best position to evaluate each venire member's demeanor and responses and to find those individuals unable to follow the law. *See Witt*, 469 U.S. at 424-26. In these circumstances, and absent any objection or questions from the defense, this Court must defer to the conclusions of the trial court.

[5]To the extent that Ortiz' Sixth Amendment claim is an attempt to show "cause and prejudice" for the state default, this argument is inappropriate in the context of a direct appeal. Although cause and prejudice may excuse a state procedural default on federal habeas corpus review of a state criminal conviction, *see, e.g., Coleman*, 501 U.S. at 750-51, no such excuse is available to a defendant seeking review by this Court through direct appeal of the state court's judgment. *See Lambrix*, 520 U.S. at 523; *Sochor*, 504 U.S. at 533; *Long*, 463 U.S. at 1041.

of this Court in *Witherspoon* and *Witt*, and therefore did not realize that Article 35.16(b)1 was unconstitutional on its face." *Id.* at 24. Ortiz argues that by failing to object to the exclusion of the various venire members, the prosecution was able to successfully stack the jury with "those who possessed the unwavering view that imposition of a death sentence was necessary in the event Petitioner's guilt were proven." *Id.* at 26. However, as discussed below, the venire members excused for cause were properly challengeable under *Witt*. Counsel was therefore not ineffective for failing to make a frivolous objection to their dismissal. Moreover, because the record on direct appeal is silent regarding why counsel did not challenge the disqualifications, the Court of Criminal Appeals correctly concluded that Ortiz had presented insufficient evidence to overcome the presumption that counsel's tactics constituted reasonable professional assistance.

A. The *Strickland* Standard

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of satisfying the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, *Strickland* requires a defendant to show both (1) that counsel rendered deficient performance, and (2) that counsel's actions resulted in actual prejudice. *Id.* at 687; *see also Bell v. Cone*, 122 S. Ct. 1843, 1850 (2002); (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Failure to meet either element of the *Strickland* test will defeat an ineffective assistance of counsel claim, making it unnecessary to examine the other prong. *Strickland*, 466 U.S. at 687.

To establish deficient performance under *Strickland*, a defendant must show that, in light of all the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," *i.e.*, "prevailing professional norms." *Id.* at 688-90; *see also Nix v. Whiteside*, 475 U.S. 157, 165 (1986). This Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential,"

with every effort made to avoid "the distorting effect of hindsight." *Strickland*, 466 U.S. at 689-90. Accordingly, there is a "strong presumption" that the challenged conduct "falls within the wide range of reasonable professional assistance," and the defendant is required to overcome the presumption that counsel's actions "might be considered sound trial strategy." *Id.* at 689.

Even if counsel's representation was deficient, the defendant must also affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* at 687. To meet this requirement, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also* (*Terry*) *Williams*, 529 U.S. at 393-95. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

B. Ortiz has failed to demonstrate that his attorney's performance fell below an objective standard of reasonableness.

The Texas courts have repeatedly indicated that ineffective assistance of counsel claims are generally disfavored on direct appeal.[6] In particular, the state court has explained that in order to defeat *Strickland*'s presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly

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[6]Texas is not alone in this conclusion. Virtually every federal circuit court has also indicated that ineffectiveness claims should be brought in a collateral attack rather than on direct appeal. *See, e.g., United States v. Cofske*, 157 F.3d 1, 2 (1st Cir. 1998); *United States v. Jake*, 281 F.3d 123, 132 n.7 (3d Cir. 2002); *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997); *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998); *United States v. Neuhausser*, 241 F.3d 460, 474 (6th Cir. 2001), *cert. denied*, 534 U.S. 879 (2001); *United States v. Evans*, 272 F.3d 1069, 1093 (8th Cir. 2001), *cert. denied*, 535 U.S. 1029 (2002); *United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989); *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc); *United States v. Griffin*, 699 F.2d 1102, 1107-09 (11th Cir. 1983); *United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999).

founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). However, "[i]n the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions." *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (footnote omitted); *see also Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000) ("[W]e are mindful that only in rare cases will the record on direct appeal be sufficient for an appellate court to fairly evaluate [an ineffective assistance] claim") (citation omitted); *Thompson*, 9 S.W.3d at 813 ("Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of a claim involving such a serious allegation") (footnote omitted); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) ("In most cases, the record on direct appeal is inadequate to develop an ineffective assistance of counsel claim"). The Texas courts have therefore concluded "that a post-conviction writ proceeding. . . is the preferred method for gathering the facts necessary to substantiate such a Sixth Amendment challenge."[7] *Robinson*, 16 S.W.3d at 810 (citations omitted); *see also Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (noting that because record on direct appeal is usually insufficient to adequately reflect failings of trial counsel, appellate court will not apply general doctrine that forbids raising a claim on habeas review after it was rejected on appeal).

In the instant case, the Court of Criminal Appeals plainly concluded that, by relying solely on the transcript from voir dire,

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[7]Of course, where a ineffective assistance of counsel claim may be adequately resolved from the trial record, Texas appellate courts will address the claim in the first instance. *See Robinson*, 16 S.W.3d at 813 n.7. Indeed, where a state habeas petitioner attempts to assert a claim during post-conviction proceedings that is based entirely on the record that is amassed during direct appeal, his allegations are generally considered procedurally defaulted. *See, e.g., Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998); *Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991).

Ortiz had presented insufficient evidence to overcome the "strong presumption" of reasonable assistance by trial counsel:

> If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal. Counsel's reasons for failing to object do not appear in the direct appeal record. And it is possible for counsel to have legitimate reasons for declining to object to a trial court's granting of a State's challenge for cause. Accordingly, we deny relief on Ortiz' ineffective assistance claims.

Ortiz, 93 S.W.3d at 88-89 (internal footnotes omitted). This judgment is patently reasonable. In the absence of a full factual record, a court may not presume that counsel's actions in these circumstances were deficient.[8] *See Strickland*, 466 U.S. at 689 (emphasizing that a "strong presumption" exists that challenged conduct "falls within the wide range of reasonable professional assistance").

Counsel could have had any number of legitimate, strategic reasons for not objecting to the disqualification of the jurors identified by Ortiz. For instance, counsel could have quite reasonably concluded that all thirteen jurors were challengeable

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[8]Ortiz incorrectly asserts that the Court of Criminal Appeals abandoned *Strickland*'s objective inquiry in favor of an analysis of counsel's subjective motivations. *See* Petition at 25. Rather, the lower court specifically stated that it only required evidence of counsel's decisionmaking where "*there is at least the possibility that the* [*challenged*] *conduct could have been legitimate trial strategy*." *Ortiz*, 93 S.W.3d at 88. In other words, unless counsel reveals otherwise, the court properly assumes that an attorney's performance is not deficient where legitimate, strategic reasons could exist for an attorney's actions.

under *Witt*.[9] In fact, prior to the questioning initiated by the trial court, the presiding judge specifically advised the venire panel that his question regarding "conscientious scruples" was meant to identify only those jurors who, "whether for religious or philosophical or any other reason . . . believe that the death penalty *should never be inflicted in any case, regardless of what the evidence might be.*" 11 RR 65-66 (emphasis added). All thirteen jurors responded to this invitation and affirmed their unwavering opposition to the death penalty. *Id.* at 67-81. Although the individual inquiries were brief, in the context of the court's examination and for the reasons apparent to both the parties and the court at trial, counsel could have reasonably concluded that the jurors were legitimately excused under this Court's Sixth Amendment precedent. Concomitantly, counsel could have concluded that some or all of the thirteen venire members would not have made favorable jurors for other reasons. The lower court therefore correctly concluded that Ortiz had failed to overcome the presumptions imposed by *Strickland*. Because there is nothing in the record to support a finding that counsel was deficient, certiorari review should be denied.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari be denied.

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[9]Ortiz speculates that his attorney was not familiar with this Court's decisions in *Witherspoon* and *Witt*. *See* Petition at 24. However, this suggestion is belied by the record. Trial counsel specifically objected to the trial court's decision to grant the State's challenge for cause regarding two jurors who initially wavered regarding whether they could personally impose the death penalty. *See* 11 RR 77-80. With one of the jurors, counsel specifically tried to rehabilitate her answer by asking whether, in an appropriate case, she could ever "make the proper findings so that the death penalty would be imposed[.]" *Id.* at 78. Clearly, counsel was familiar with the fact that jurors were required to have more than generalized objections to the death penalty before they could be excused for cause.

Respectfully submitted,

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No. 02-1189

IN THE

Supreme Court of the United States

October Term, 2003

RICARDO ORTIZ
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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1. Respondent erroneously asserts that Petitioner's constitutional challenge to the facial validity of Article 35.16(b)1 was procedurally defaulted.

On page 14 of its brief, Respondent states: "Furthermore, to the extent Ortiz seeks review of the manner in which the statute [Article 35.16(b)1] was applied to the jurors in this case, the Court of Criminal Appeals found his claims to be procedurally defaulted under the contemporaneous objection rule." It carries forward its procedural default analysis at page 19 of its brief, arguing that it constitutes an adequate and independent state ground which precludes review by this Court. These assertions misrepresent the record. The Court of Criminal Appeals' opinion reflects that it rejected Petitioner's facial challenge to Article 35.16(b)1 (ground of error two of Petitioner's brief) after concluding that it had previously narrowed the construction of the Article 35.16(b)1 to what is constitutionally permissible, and could "perceive no further basis for complaint." (see opinion pages 16a and 17a, Appendix to original writ petition)

The Court of Criminal Appeals then turned to Petitioner's ninth ground of error -- which was that his trial counsel rendered ineffective assistance by allowing several prospective jurors to be removed for cause in violation of this Court's decision in Wainright v. Witt, 469 U.S. 412 (1985).[1]

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[1] Ground of error nine alleged: "By allowing, without objection, several prospective jurors to be disqualified for cause solely because of their conscientious scruples in regard to the infliction of the death penalty, trial counsel for Ortiz rendered ineffective assistance of counsel." See Petitioner's brief to the Court of Criminal Appeals, p. 69. Grounds of error ten and thirteen were drafted on the assumption that Witherspoon error had not been waived and alleged that Petitioner's right to a fair and impartial jury under the Sixth and Fourteenth Amendments had been violated. Id. at 125, 130.

The opinion states: "Ortiz next contends that a number of jurors were excused in violation of *Witt*." Id. The opinion then proceeds to address Petitioner's ninth ground of error -- and grounds ten and thirteen as well -- by concluding that Petitioner waived Witt error by not objecting to the removal of these jurors at the trial court level.

2. Respondent erroneously asserts that Petitioner's facial challenge to Article 35.16(b)1 was waived.

The Court of Criminal Appeals' refusal to find that Petitioner had waived error on his facial challenge to Article 35.16(b)1 is understandable. Ever since its decision in Rabb v. State, 730 S.W.2d 751 (Tex.Crim.App. 1987), the Court of Criminal Appeals has recognized that "[q]uestions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by appellate courts, even when such issues are raised for the first time on appeal." (see Rabb at 752). In Briggs v. State, 789 S.W.2d 918 Tex.Crim.App. 1990), the Court of Criminal Appeals modified the Rabb rule. It held that while such an objection was necessary at the trial court level to preserve a constitutional challenge to a statute as applied, no such objection was necessary to preserve error to a facial challenge. Id. at 919, 924. The decision also reaffirmed the validity of the Court of Criminal Appeals' prior decision in Rose v. State, 752 S.W.2d 529 (Tex.Crim.App. 1988), a case which recognized the right of an appellant to raise for the first time on appeal a constitutional challenge to the facial validity of a mandatory parole instruction statute. The Briggs limitations was carried forward in Garcia v. State, 887 S.W.2d 846 (Tex.Crim.App. 1994, where the Court of Criminal Appeals noted the following in rejecting the appellant's "as applied" challenge:

> The State asserts, and appellant concedes, that no objection was raised, nor any motion made, at trial

> concerning the constitutional operation of the statute as it pertained to appellant with respect to these three points of error. Because Article 37.071 was not facially unconstitutional ..., appellant was required to object at trial in order to preserve any error for purposes of appeal. Garcia, supra at 861.

The same analysis was applied in Holberg v. State, 38 S.W.3d 137, cert. denied, 534 U.S. 972 (2001). The appellant there argued for the first time on direct appeal that Texas Penal Code Section 19.03 and Article 37.071 of the Texas Code of Criminal Procedure were unconstitutional on their face. Id. at 139. Citing Rabb v. State, supra, the Court of Criminal Appeals refused to find waiver and observed that "Although appellant made no such objection in the trial court, we have held that "[q]uestions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by appellate courts, even when such issues are raised for the first time on appeal." Id. at f.n. 7.

Every one of the 14 intermediate courts of appeal in Texas has followed the Court of Criminal Appeals lead and concluded that a facial constitutional challenge to a criminal statute can be raised for the first time on appeal. See e.g. Cartier v. State, 58 S.W.3d 756, 759 (Tex.App.-Amarillo 2001, pet. ref'd)(stating that unlike an "as applied" challenge to a statute, "a challenge that a statute is unconstitutional on its face can be considered even when raised for the first time on appeal because if a statute upon which a conviction is based is unconstitutional, 'it is void from its inception, is no law, confers no rights, bestows no power on anyone, and justifies no act performed under it.'"; Bader v. State, 15 S.W.3d 599, 603 (Tex.App.-Austin 2000, pet. ref'd)(same); Sullivan v. State, 986 S.W.2d 708, 711 (Tex.App.-Dallas 1999, no pet)(same); McGowan v. State, 938 S.W.2d 732, 740 (Tex.App.-Houston [14th Dist.] 1997, no pet.)(same); Rodriguez v. State, 71

S.W.3d 800, 802 (Tex.App.-Texarkana 2002, no pet.)(same); Stewart v. State, 13 S.W.3d 127, 130 (Tex.App.- Houston [1st Dist] 2000, pet. ref'd)(same); Battles v. State, 45 S.W.3d 694, 702-03 (Tex.App.--Tyler 2001, no pet.)(same); Sisk v. State 74 S.W.3d 893, 895-896 (Tex.App.-Fort Worth 2002, no pet.)(same); Webb v. State, 899 S.W.2d 814, 817-818 (Tex.App.-Waco 1995, pet. ref'd)(same); Gilliam v. State, 746 S.W.2d 323, f.n. 1 (Tex.App.-Eastland 1988, no pet.)(same); Turner v. State, No. 08-01-00360-CR (Tex.App.-El Paso August 29, 2002) (unpublished opinion, same); Hawkins v. State, 964 S.W.2d 767, 770 (Tex.App.-Beaumont 1998, pet. ref'd)(same); and In re Torres, 966 S.W.2d 723, 724-725 (Tex.App.-San Antonio 1998, no pet.)(same).

Suffice it to say, not one decision can be found to support Respondent's assertion that a facial challenge to the constitutionality of a criminal statute is subject to the contemporaneous objection rule. This explains why the Court of Criminal Appeals never ruled that Petitioner's failure to challenge the facial validity of Article 35.16(b)1 at the trial court level resulted in waiver of error. Based on clearly established law, it realized that no waiver of error could occur where a facial challenge is asserted to a criminal statute.

3. Respondent erroneously asserts that the "conscientious scruples" provision of Article 35.16(b)1 has been interpreted by the Court of Criminal Appeals.

Respondent asserts that "the Court of Criminal Appeals has consistently interpreted the "conscientious scruples" provision of this statute [Article 35.16(b)1] to permit a venire member to be disqualified from service in a capital case *only* where the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath." See page 18 of its brief. It cites the

following cases for this proposition: Holberg v. State, 38 S.W.3d 137, 141 (Tex.Crim.App.), cert denied, 534 U.S. 972 (2001); Ramos v. State, 934 S.W.2d 358, 366 (Tex.Crim.App. 1996); McFarland v. State, 928 S.W.2d 482, 509 n. 24 (Tex.Crim.App. 1996); Wolfe v. State, 917 S.W.2d 270, 275-276 (Tex.Crim.App. 1996); Cuevas v. State, 742 S.W.2d 331, 334 (Tex.Crim.App. 1987); and Ortiz v. State, 93 S.W.3d 79 (Tex.Crim.App. 2002) - the case which involves Petitioner.

However, Respondent's cited authorities are not instructive. Witt is not cited on page 141 or anywhere else in the Holberg opinion, as Respondent asserts. In Ramos, the appellant did not contend that prospective jurors were removed in violation of Witt, but attacked the constitutionality of the Witt standard itself. See Ramos at p. 366. Wolfe is also inapposite. No challenge was made to Article 35.16(b)1 and the issue addressed was whether the trial court had erroneously violated Witt in granting two of the State's challenges for cause. The Court of Criminal Appeals also did not endeavor to interpret Article 35.16(b)1, or purport to define any provision of the statute.

Respondent's reliance on footnote 24 in McFarland v. State, supra, is of no value either. Aside from addressing appellant's equal protection claim, the footnote does not interpret Article 35.16(b)1 or define any of its provisions. The one noteworthy aspect of the footnote is its acknowledgment that Article 35.16(b)1 should not be applied contrary to the standards set forth in Witt. Accordingly, rather than hurting Petitioner's claim, the footnote supports Petitioner's claim that Article 35.16(b)1 is facially unconstitutional. Respondent's citation to Cuevas v. State is also misplaced. Nothing in this opinion purports to interpret the meaning of Article 35.16(b)1 or to define any word or phrase in the statute. As in Wolfe, the only issue raised was whether prospective jurors were excused in violation of Witt. Again, no challenge was lodged to the

constitutionality of Article 35.16(b)1, as in Petitioner's case. Respondent's reading of Ortiz is also misplaced. Respondent's assertion that "a juror cannot be disqualified under Article 35.16(b)(1) if he is acceptable under Adams and Witt" does not correctly state the holding of Ortiz. The Court of Criminal Appeals in Ortiz held that Ortiz had presented nothing for review with regard to ground of error two because the statute had previously been given a narrowing construction. See Ortiz v. State, (See Pet. App. 16a -17a). Thus, Respondent's claim that the "Texas courts have tethered the statute's requirements to the constitutional standards announced by this Court" is not accurate. If the statute was so "tethered", the Court of Criminal Appeals would have decided Petitioner's constitutional challenge to Article 35.16(b)1. But it did not. For this reason, none of Respondent's cited authorities either interpret or demonstrate a narrowing construction of Article 35.16(b)1.

4. Respondent erroneously asserts that it was a legitimate trial strategy for Petitioner's trial counsel to strike all thirteen prospective jurors from the venire panel.

Respondent argues that it was a legitimate trial strategy for the trial court to exclude 13 prospective jurors who, "whether for religious or philosophical or any other reason ... believe[d] that the death penalty *should never be inflicted in any case, regardless of what the evidence might be*." (quoting from p. 26 of Respondent's brief). Respondent's contention overlooks this Court's holding in Witt, which recognized that the State cannot remove prospective jurors merely because they are opposed to the death penalty. The test is whether prospective jurors can perform their duties as jurors in accordance with their oath and the instructions given to them. It is only when jurors' views prevent or substantially impair them from performing their obligation as jurors that they are subject to challenge for cause. See Witt, 469 U.S. at 424-426.

5. Respondent mis-characterizes Petitioner's facial challenge to the constitutionality of Article 35.16(b)1 as being an "as applied" challenge.

On page 19 of its brief, Respondent states that Petitioner "repeatedly characterizes the argument included in his petition as a 'facial' challenge to the constitutionality of Article 35.16(b)(1)...." In the same paragraph, Respondent asserts that "simple reference to the lower court's decision reveals that the court declined to consider the merits of Ortiz' 'as applied' claim because of an independent state procedural default." Id. As the Court of Criminal Appeals' opinion in Ortiz bears out, Petitioner never asserted an "as applied" challenge to Article 35.16(b)1 at the trial court level. Petitioner confined himself to arguing that Article 35.16(b)1 was unconstitutional on its face. Whether Petitioner erred in attacking the constitutionality of Article 35.16(b)1 as facially invalid rather than "as applied" is for this Court to decide. But Respondent has no right to characterize Petitioner's "facial" challenge as an "applied" challenge when the record clearly and unequivocally reflects that Petitioner has consistently asserted that Article 35.16(b)1 is unconstitutional on its face.[2] Respondent's claim that

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Ironically, Respondent describes Petitioner's challenge to Article 35.16(b)1 as an "applied challenge" but never once attempts to interpret Article 35.16(b)1 in accordance with its plain meaning. In Hernandez v. State, 757 S.W.2d 744, 750 f.n. 10 (Tex.Crim.App. 1988)(en banc), the Court of Criminal Appeals observed that although "the statute law [Article 35.16] still does" authorize a challenge for cause, the "effect of Witherspoon ... was effectively to remove the exception from Texas law on constitutional grounds...." Article 35.16(b)1 therefore must be contrasted with statutes such as Article 37.071, which suffer from no glaring defect. See e.g. Penry v. Lynaugh, 109 S.Ct. 2934, 2952 (1989)(holding that Art. 37.071 was unconstitutional as applied to Penry only because the punishment issues did not provide the jury with an opportunity to give mitigating effect to the punishment evidence in his case). Article 35.16(b)1 is facially invalid because it authorizes the State to remove for

Petitioner's trial counsel may have had other reasons for allowing the State to systematically remove every prospective juror from the venire panel with conscientious scruples is also without merit. Respondent does not deny that the State challenged for cause all prospective jurors who had conscientious scruples in regard to the death penalty. Thus, Respondent recognizes that it was not an isolated prospective juror with conscientious scruples who was removed by the State from the venire panel, but the entire panel of such jurors. This showing alone establishes that Petitioner trial counsel's failure to object was not the result of trial strategy, but of ignorance and a mistaken belief that Article 35.16(b)1 was to be applied to the letter. No competent trial counsel defending a person charged with a capital crime would have concluded that allowing only "death qualified" jurors with no conscientious scruples to sit in judgment of Petitioner could possibly be an objectively reasonable trial strategy.

6. Respondent erroneously asserts that Petitioner does not contest that the contemporaneous objection rule precludes federal review of this writ petition.

On page 16 of his petition for writ of certiorari, Petitioner appraised this Court of several Texas case authorities

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cause all prospective jurors who have any negative attitude or belief regarding the death penalty, or any sensibilities or reservations as to its use, whether reasonable or not. Thus, Article 35.16(b)1 irreconcilably conflicts with Witherspoon and its progeny of case authority because it recognizes no due process limitation on the power of the State to exclude prospective jurors from serving on a death penalty jury. On its face, the statute violates a defendant's right under the Sixth Amendment and Fourteenth Amendments to a fair and impartial jury. Moreover, from a constitutional perspective, the statute is identical to the statute declared unconstitutional by this Court in Witherspoon over 30 years ago. As recognized by the Hernandez Court, the decision in Witherspoon itself resolves the issue that Article 35.16(b)1 is unconstitutional on its face.

which recognized the right of an appellant to assert a facial challenge to the constitutionality of Article 35.16(b)1 for the first time on appeal. Nevertheless, Respondent asserts that Petitioner does not contest that the Texas contemporaneous objection rule constitutes an adequate and independent state ground to bar federal review of Petitioner's claim. See Respondent's brief, page 20. This assertion is false and should be disregarded.

7. Respondent erroneously states that removing prospective jurors solely because of their conscientious scruples in regard to the death penalty does not state a claim with substantive merit.

Respondent's claim that all 13 of the prospective jurors identified by Petitioner expressed an unwavering opposition to the death penalty and explicitly confirmed that they would oppose the death penalty in every circumstance are incorrect statements of fact. These prospective jurors were not asked whether they could follow the law as given by the trial court. They were just asked to identify whether they had conscientious scruples in regard to the death penalty. Therefore, there is no way of knowing whether any of the referenced jurors would have been able to perform their duties in accordance with their oath and the instructions of the trial court.

8. Respondent erroneously disputes Petitioner's claim that the Court of Criminal Appeals has failed to narrow the construction of Article 35.16(b)1.

On page 19 of its brief, Respondent disputes Petitioner's claim that the Court of Criminal Appeals failed to apply a narrowing construction to Article 35.16(b)1. Although Respondent concedes that the Court of Criminal Appeals did not apply a narrowing construction to the statute, it nonetheless asserts that the Court of Appeals "declined to consider"

Petitioner's constitutional challenge to Article 35.16(b)1 because Petitioner failed to object at the trial court level to the trial court's removal for cause of 13 prospective jurors. As noted above, the trial court's opinion does not support the "implied finding" Respondent claims exists. With regard to Petitioner's facial challenge to the constitutionality of Article 35.16(b)1, the Court of Criminal Appeals *expressly* held that nothing was presented for review because a narrowing construction had previously been applied to the statute. It is in regard to grounds of error nine, ten and thirteen that the Court of Criminal Appeals' opinion reflects that error was waived. All of these grounds of error concern Petitioner's failure to preserve Witherspoon-Witt error. The Court of Criminal Appeals' determination that Petitioner had waived error as to these grounds of error is consistent with both federal and Texas law. Its refusal to find that Petitioner had waived error with regard to his constitutional challenge to Article 35.16(b)1 is also consistent with clearly-established law. Every appellate court in Texas had recognized that a facial constitutional challenge to a statute can never be waived. Respondent's assertion that Petitioner has waived error with regard to his constitutional challenge to the facial validity of Article 35.16(b)1 is therefore untrue. This ground of error has not been waived.

CONCLUSION

For reasons outlined above, Petitioner submits that his petition for writ of certiorari should be granted.

Respectfully submitted,

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